

**EXHIBIT D**

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re:

BERNARD L. MADOFF INVESTMENT  
SECURITIES LLC,

Index No.  
08-01789 (BRL)

Debtor.

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IRVING H. PICARD, as Trustee for the  
Liquidation of BERNARD L. MADOFF  
INVESTMENT SECURITIES LLC,

Plaintiff,

Adv. Pro No.  
09-1172 (BRL)

V.

STANLEY CHAIS, et al,

Defendants.

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May 5, 2010  
United States Custom House  
One Bowling Green  
New York, New York 10004

In Re: Hearing

B E F O R E:

HON. BURTON R. LIFLAND,  
U.S. Bankruptcy Judge

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1 PROCEEDINGS

2 THE COURT: Bernard L. Madoff Investment  
3 Securities, Debtor; Irving H. Picard, as Trustee versus  
4 Stanley Chais, et al.

5 MR. SMITH: Good morning Your Honor.

6 MR. SHEEHAN: Good morning. For the  
7 record, David Sheehan with Baker Hostetler for Irving H.  
8 Picard, as Trustee. With me our my two colleagues, Marc  
9 Hirschfield and Paul Eyre. Each of us will respectfully  
10 handle a certain portion of the Chais applications as I  
11 refer to them. Today we will be dealing with all the  
12 defendants. I guess the best way to put it, is that I we  
13 will dealing with the Chais applications that are due March  
14 8. There are two other applications out there that will be  
15 dealt with in today's hearing by my colleagues.

16 MR. WHITE: Good morning, Your Honor.

17 THE COURT: Good morning.

18 MR. WHITE: My name is Phillip White, and  
19 with me is my colleague Andrew Sherman. I think we  
20 represent most of the defendants that Mr. Sheehan is  
21 talking about. We represent about 46 individuals and  
22 entities that are listed, and there are some stipulations  
23 that we will file with the Court. It be would be hard for  
24 me to list them all here. I would call them the Chais  
25 related parties as to distinguish it from the fact that we

1 do not represent Mr. Stanley Chais, individually, himself.

2 MS. KLESTADT: Tracy Klestadt, from the  
3 law firm of Klestadt & Winters. I represent Michael  
4 Chasalow.

5 MR. WHITE: I guess the first order of  
6 business is our motion to dismiss under 12(b)(6) for  
7 failure to state a claim.

8 I gather that we have agreed what we will  
9 do is handle the motion seriatim so that would be first on  
10 the agenda. And the motion we filed on behalf of Mirie  
11 Chase to dismiss for lack of personal jurisdiction would be  
12 handled fairly quickly.

13 THE COURT: Sure.

14 MR. WHITE: I guess I am better off at the  
15 podium. Is that what you would prefer, Your Honor?

16 THE COURT: Whatever make you comfortable.

17 MR. WHITE: I am new to the Bankruptcy  
18 Court, Your Honor. I would like to thank you for hearing  
19 me and forgive my lack of experience in your courtroom.

20 THE COURT: It is the same as every other  
21 courtroom in the circuit that I know of except for the  
22 Court of Appeals.

23 MR. WHITE: Well, that is good to know,  
24 Your Honor.

25 THE COURT: We don't have lights that cut

1 you off. Sometimes I cut you off.

2 MR. WHITE: My intention is to be  
3 relatively quick, frankly, Your Honor, because I don't  
4 think counsel's role in the motion to dismiss is to go over  
5 everything that is in the briefs.

6 The Court is well aware of the intricacies  
7 of the laws of fraudulent conveyances, and other issues  
8 that Your Honor may have that you would like to question me  
9 about. I don't intend to spend much time doing that kind  
10 of thing.

11 I would like to try to focus the Court on a  
12 couple of key things that made this motion to dismiss  
13 different than the run of the mill. We all as litigators  
14 are very accustomed to people getting sued and it feels  
15 almost like an ordinary event. Fraudulent conveyance I am  
16 told by my colleagues in the bankruptcy bar is not an  
17 extremely serious type of allegation.

18 To me I want to ask the Court as I have to  
19 suspend that feeling of routineness for a moment and put  
20 yourself in the place of the children of Stanley Chais who  
21 I do represent with the exception of Mr. Chasalow, who are  
22 just ordinary people. Obviously, very wealthy before  
23 December of 2008, but who are human beings.

24 In December of 2008 they woke up one  
25 morning and find out their lives are changed because Bernie



1 Madoff turned out to be a pretty bad guy taking along other  
2 people's money.

3 You know what? They went to work that day  
4 like other people and I suspect they got some sympathy and  
5 whatnot from their colleagues in their community a few  
6 months later though the complaint that has been filed here  
7 trickles out and the result is probably very different.

8 Here they are accused of being active  
9 participants in what is the largest, ugliest Ponzi scheme  
10 in the history of the United States.

11 And while we may think of a fraudulent  
12 conveyance as a kind of routine thing this complaint  
13 alleges that they, in fact, stole \$300 million of innocent  
14 victims.

15 We should look at the 9(b) element, which  
16 is the first one of the elements I would like to look at.

17 From the perspective of people who are  
18 individuals, there are, of course, lots of entities I  
19 represent as well, who are faced with that problem, these  
20 people eventually see the complaint and they say, oh, my  
21 goodness, what have I done.

22 What does this complaint tell me about what  
23 evil things I have done to be lumped in with Bernie Madoff,  
24 and perhaps my father who turns out to be allegedly not a  
25 particularly good guy either.

1 When you look at the complaint, and I have  
2 read it a few times, it doesn't say much. It looks like  
3 at the end of the day that these people are accused of  
4 really the same things that any other investor in the  
5 Madoff transactions have been. They had accounts. We  
6 don't deny that.

7 They had distributions, quite substantial  
8 distributions as it turns out.

9 The only other allegation is that in there  
10 they had a famous father who turns out to be alleged to  
11 have been very close with Bernie Madoff and had done some  
12 bad things.

13 The rest of what is in the complaint has  
14 nothing to do with them. I would suggest to the Court  
15 that the purpose of Rule 9(b) is to protect people like my  
16 clients from this kind of overreaching.

17 They are supposed to be given particular  
18 notice of what it is they did, not of what other people  
19 did.

20 So when you think about, it is the  
21 complaint alleges all kinds of things about what Stanley  
22 Chais did, outsized returns, manufactured losses,  
23 fabricated transactions, and the like.

24 There is no allegation that my people knew  
25 about them, did them, ever spoke to Mr. Madoff or either,

1 never mind about their accounts or about these  
2 transactions, or directed anything or what have you.

3 They are like anyone else, Your Honor, any  
4 other investor who received distributions from Madoff.

5 Yet, they are treated completely  
6 differently, Your Honor. So to me it is really incumbent  
7 on the Court here to do the gatekeeper function that 9(b)  
8 contemplates.

9 I represent some 46 individuals and  
10 entities. There is not one allegation other than the  
11 amounts that were withdrawn from the various accounts that  
12 pertains to their specific situation. The ones about what  
13 Mr. Chais did or did not do, but there is no allegation  
14 that they knew him. The ones about the so-called red  
15 flags that related to what general creditors, ordinary  
16 folks might have known, is not specific to them.

17 Even the allegations that relate to some of  
18 the specific transactions in what are called the Chais  
19 family accounts, they might relate to one of the 40 people  
20 or so that are the entities I represent but not to all of  
21 them as a whole.

22 They are treated as some kind of monolithic  
23 evil empire in this complaint and the reality is they are  
24 not and there is no basis in the complaint for doing that.

25 I would urge the Court that given the

1 structure of the complaint to say to the Trustee, look, you  
2 have overreached here with regard to these defendants.  
3 You could have treated them differently, not alleged they  
4 were active participants. Not made claims for actual  
5 fraudulent based fraudulent conveyances. You chose not  
6 to. You have the obligation to come forward with the  
7 goods on what each individual and each entity is alleged to  
8 have done or to have knowledge of in those circumstances,  
9 you can't treat them all as if they are extensions of the  
10 family of Chais.

11 Now, the complaint deals with that a little  
12 bit by saying that Stanley Chais and all of my clients are  
13 alter egos of one another.

14 Well, the New York Law Department does not  
15 that I am aware of and there has been no case cited by the  
16 Trustee in his opening papers that suggests a human being  
17 can be the alter ego of another human being. Nor does the  
18 complaint make any of the allegations that are normal to an  
19 alter ego or piercing of the corporate veils type of  
20 transaction, all of which would be subject to 9(b) and  
21 which have a very heightened pleading standard.

22 So rather when we point this out in the  
23 moving papers, rather than going back an amending the  
24 complaint or explaining what further explanation there  
25 would be or what have you, they respond by changing the

1 issue. No longer are they saying that they solved the  
2 problem of lack of specificity by alter ego kind of  
3 allegations. They switched it. They say we are changing  
4 to agency now. Stanley Chais was the agent of all the  
5 individuals and entities that Mr. White represents.

6 That is not even in the complaint. So the  
7 appropriate means for that, if they would have a basis for  
8 that would be first totally inconsistent with the idea of  
9 alter ego because in an alter ego claim, of course, the  
10 person in charge of this case alleges that Stanley Chais  
11 controls all the entities. In an agency arrangement the  
12 entities control the agent.

13 It is the complete opposite of one another.  
14 There is no way this complaint could have given anyone  
15 notice of that set of allegations and switching in  
16 midstream without pleading it is not a fair game. It  
17 certainly can't satisfy the exigency requirement of 9(b),  
18 Your Honor.

19 So, Your Honor, that is the main problem,  
20 that all these people are lumped together as an entity.  
21 This is no explanation of who did what. And there is no  
22 allegation that anyone did anything that is actually wrong.

23 On that basis all of the claims that are  
24 predicated on actual fraud should be ripe for being  
25 dismissed.

1 Frankly in this case at this point, the  
2 normal repleading should not be done here. It is over a  
3 year later, if there are any new factual allegations that  
4 is coming in, I think the Court should be assuming what the  
5 in complaint is the best they should do otherwise they  
6 couldn't amend it.

7 Let me move on to the next point. For  
8 every one of these fraudulent conveyance complaints, there  
9 needs to be an allegation in each of the claims that each  
10 of the entities was a net winner. That is a requirement  
11 in the context of a fraudulent conveyance claim. It is a  
12 Ponzi scheme. We don't dispute that.

13 The opposition papers make a great deal of  
14 how we are complaining or trying to argue the net equity in  
15 a different format. We didn't even submit papers with  
16 regard to the net equity argument and my point is, the  
17 Court has, of course, decided the method of calculation  
18 that is going to be used, but it doesn't matter what method  
19 the Court decides one way or the other for net equity.

20 The point is you can't figure out if you  
21 are a net winner or loser other than on an account by  
22 account basis, and by subtracting the amount that is  
23 alleged to have deposited against the amounts that are  
24 alleged to have been withdrawn.

25 In the circumstances where many of these

1 accounts predate according to the allegations of the  
2 complaint the creation of Madoff's Ponzi scheme in the  
3 early '90s. The complaint itself proves that there has to  
4 be some actual deposits made in these accounts that would  
5 be offset against the withdrawals. There is no  
6 allegations about any of that.

7 What there is a very lengthy list of  
8 withdrawals that were made by my client and an allegation  
9 well, they total up to some \$300 million. It must be more  
10 than they put in and so, therefore, they must be net  
11 winners.

12 That is not enough, Your Honor. It gives  
13 no individual defendant notice of what it is being accused  
14 of. They are not part of one giant scheme. They are  
15 individual trusts and human beings that had various  
16 different accounts that are entitled to be given notice for  
17 the amounts that they are alleged to have put in versus the  
18 amounts they are alleged to have taken out.

19 So, therefore, there could be some  
20 calculation by whatever means of net equity. It is a  
21 pleading fall-out, just like the failure to do 9(b) and  
22 satisfy the specificities, to fail to allege property net  
23 equity and even if there is net equity, other than in a  
24 conclusory aggregate sort of way.

25 The last point I want to point out to the

1 Court is the issue about the statute of limitations and how  
2 it works in this circumstance.

3 Your Honor, first of all, the main point I  
4 am trying to get to is there cannot be claims that survive  
5 this motion that go back more than six years since the  
6 filing of the petition at a minimum.

7 The Court will know we made an argument it  
8 ought to be go up to the date of the filing of the  
9 petition. I will leave that to the papers, but for the  
10 moment let's assume that's the petition date of which six  
11 years earlier is the cutoff.

12 The reason is actually relatively simple.

13 As to the New York DCL we all know it is  
14 settled law in the Second Circuit, and in New York there is  
15 no tolling available for constructive fraud claims under  
16 the DCL for fraudulent conveyance.

17 So those claims, Your Honor, are limited to  
18 the period immediately preceding the petition at a minimum.  
19 I am not going to argue about the five months here.

20 As to the actual fraud claims to the extent  
21 there is a claim of tolling that claim of tolling is based  
22 upon the fact no one could have discovered it yet, the  
23 complaint alleges that anyone could have discovered it.

24 So you can't have it both ways, Your Honor.  
25 There is a dichotomy in the allegations of the complaint,



1 and while people are entitled to plead in the alternative  
2 and are entitled to legal theories but not to alternative  
3 facts. The facts are the facts. Either these facts were  
4 sufficient for a mythical or a hypothetical creditor to  
5 have discovered that Madoff was a fraudster or they were  
6 not.

7 That has opposite consequences for the  
8 Trustee's complaints, on the one hand. If you assume they  
9 are on a valid basis on which a reasonable creditor or  
10 ordinary creditor could have discovered the fraud, then you  
11 do get tolling but you get no constructive fraud claims  
12 because then you would have good faith.

13 The other way around, Your Honor, to the  
14 extent these things could not have been discovered, you get  
15 tolling and no good faith.

16 My point is what that means and what is  
17 important from the standpoint from the people I represent,  
18 is that the liabilities that they are faced with here are  
19 contained to a six-year period that is measurable rather  
20 than reaching back to the beginning of Madoff's  
21 relationship with Stanley Chais or the beginning of the  
22 accounts and entities that are involved here and I think  
23 that even at this early stage of the proceeding given the  
24 status of the law they are entitled to that comfort because  
25 the law provides for it, and the pleadings that the Trustee

1 has set before the Court does not sufficiently plead any  
2 basis for going back more than the six years.

3 Your Honor, if you have any questions, or  
4 we could talk about inconsistencies, but I suspect you know  
5 more about it than I do from your years on the bench, but I  
6 am happy to entertain any questions you have. I wanted to  
7 focus the Court on those issue.

8 THE COURT: Thank you. Now, I will hear  
9 from the other side. Unless Mr. Klestadt thinks that it  
10 is appropriate to speak now.

11 MR. KLESTADT: Your Honor, I have a  
12 separate motion for my client somewhat more -- perhaps a  
13 couple of minutes of argument if I may.

14 THE COURT: Why don't we just focus on the  
15 arguments that have just come up.

16 MR. KLESTADT: Very well, Your Honor.  
17 Thank you.

18 MR. SHEEHAN: Thank you, Your Honor. I  
19 think actually the beginning and end of Mr. White's  
20 argument sort of answers several questions. He spoke at  
21 the beginning of ordinary people and that is who he  
22 represents, but indeed that is exactly who the Trustee  
23 represents in this proceeding.

24 All of the ordinary people who did not get  
25 their money back, all of those people at the wrong end of

1 the Ponzi scheme, not like the ordinary people that got  
2 hundreds of millions of dollars of fictitious profits. He  
3 represents the ordinary people who lost money in this case,  
4 in this Ponzi scheme.

5 In the Ponzi scheme, Your Honor, he should  
6 be able to get that money back from the other ordinary  
7 people. There is another thing that is important about  
8 ordinary people. You and I both know for the year  
9 and-a-half in this case there are out there many people who  
10 did not know what was going on. They did not have Stanley  
11 Chais involved for decades with Mr. Madoff on a virtual  
12 daily basis as their dad, as the director of their family  
13 trust, as the person who was involved in wide investments  
14 throughout Madoff and his entire career practically. They  
15 did not have that.

16 They were out there duped totally. I don't  
17 have any question in mind that there is out there not one,  
18 but many, if not dozens of hypothetical creditors that fit  
19 right in that category. They are not hypothetical but  
20 very real and they didn't know.

21 Your Honor, those two points I think are  
22 very salient in terms of where we should go with the  
23 motion. The other thing that really strikes me as I  
24 listen to Mr. White, there used to be, and I think it is  
25 still true that what we should be doing in a complaint is

1 giving our adversaries and the defendants a road map, to  
2 let them know what is going on, what are we really talking  
3 about here. Listening to Mr. White I think we gave them  
4 quite a road map. I think he knows exactly what is going  
5 on. He knows that Stanley Chais together with his  
6 children and all the various enterprises outlined in the  
7 complaint were actively involved in investing with Madoff  
8 for decades and taking out what they now know to be  
9 fictitious profits. We believe, and we have alleged that,  
10 in fact, Mr. Chais knew and participated.

11 Just by way of example in the complaint we  
12 give several really good examples, we could give dozens and  
13 dozens, and I don't know if anyone asks us to prove that in  
14 our complaint, but there is more than enough if we only  
15 look at the manipulation of the accounts. They are  
16 backdated.

17 I don't know much about any investor,  
18 sophisticated or otherwise, but certainly Mr. Chais and  
19 presumably his family had some degree of sophistication and  
20 would realize you really can't call up and change  
21 statements six months after the transaction took place.

22 That doesn't happen to ordinary people.  
23 That happens to extraordinary people like Mr. Chais and his  
24 family. That is why they have been sued. That is why we  
25 have outlined to them all of those transactions, dozens and

1 dozens and dozens of transactions going all the way back,  
2 yes, and if you look it goes back into the 1980s.

3 We believe, Your Honor, and we don't have  
4 to prove it here today because we are not at a trial but we  
5 will at trial prove that the Ponzi scheme went back into  
6 the 1980s.

7 In fact, Mr. DePasquale has stated that,  
8 and the facts will come in to prove it that Mr. Chais was  
9 well aware of it.

10 It is not guilt by association. We can't  
11 ignore what is the reality. He wants to bring reality into  
12 the courtroom. What is the reality? The reality is this  
13 is a family, and they talk to one another, and that money  
14 transfers by Mr. Chais from one family account to another  
15 family court. He takes fictitious profits and puts them  
16 into another family account. He is not doing that  
17 willy-nilly on his own. It's done by people who know each  
18 other.

19 I don't mean to be facetious when I say  
20 this but if this was such an allegation we would allege  
21 that there is mishpocha. You know what this means.  
22 These people are all family. They all talk to one  
23 another. That is obvious from everything that transpires  
24 in terms of the transactions in these accounts.

25 Going back to the beginning as it were,

1 what we have here is we have an allegation --

2 THE COURT: The argument is it may be  
3 obvious and inferred, but it is not in the pleading.

4 MR. SHEEHAN: But, I believe, it is, Your  
5 Honor, in this sense it outlines what Mr. Chais did. That  
6 is true in some detail, but it also outlines there are  
7 things happening in these other accounts, not just in his.

8 It is enough to give you notice. We didn't  
9 prove it, I agree with that, but it's enough to give every  
10 defendant in this case notice that there were extraordinary  
11 profits that should have given you notice, where there were  
12 transactions that were backdated, that should have given  
13 you notice and not least that there were hundreds of  
14 millions of dollars of fictitious profits.

15 They are on the wrong end of the Ponzi  
16 scheme, and the mere fact they were in it this long tells  
17 the story. There is more than enough in this complaint  
18 that incorporates not Mr. Chais, but all of the other  
19 participants here.

20 Look at it this way, Your Honor, just the  
21 mere fact that they got fictitious profits alone, under the  
22 bankruptcy statute as we have alleged, gives us the right  
23 to get this money back. Good faith or not, that is  
24 fictitious profit. That is what we alleged.

25 We have not, and I agree with Mr. White on

1 this, given him a final number. That is because that  
2 number will be going through some more accounting. We do  
3 need their books and records to get their checks. This  
4 fraudster, we have really torn apart his records and, we  
5 are not sure of every nickel that went in and out. We  
6 know hundreds of millions of dollars from 1995 forward was  
7 indeed taken, but we need to go back further. We believe  
8 it will establish that there is even more than money due  
9 and owing, but that is subject to discovery.

10 We have not hidden the fact that it is out  
11 there. We are not sort of hiding everything here.  
12 Everything is right in front of the entire group. They  
13 know exactly what is going on.

14 What will happen after this, after we get  
15 past this motion will be the fact this will be ordinary  
16 discovery. If has been a year. In the last year we  
17 could have had a lot of discovery and been further along in  
18 this case. They would have real insight beyond what is in  
19 the pleading. But they have more than enough notice in  
20 this pleading enough to put together their defense and know  
21 what is going.

22 For example, Your Honor, each of these  
23 involves a transaction. We have given them all the  
24 transactions, we have listed every one of them.

25 That is what is the heart and soul of the

1 case, Your Honor, are those transactions. What more do  
2 they want us to do? If Your Honor wishes, and I don't mean  
3 this in the way to be pejorative, but it would require  
4 hundreds and hundreds and hundreds of pages of a complaint  
5 to give you every one of those transactions and outline in  
6 a way that we will do in discovery, and they will fully  
7 realize everything that is going on.

8 If a pleading requires us to do that, fine,  
9 we will go back to the drawing board and do that. We  
10 think we gave our adversary a summary of every transaction  
11 that is involved, everyone who we are relying upon to prove  
12 hundreds of millions of dollars of fictitious profits.  
13 That is more than adequate for them to not only have notice  
14 but to defend the case. Those are the transactions that  
15 are in play.

16 Two other things, Your Honor, before I sit  
17 down. Well, there is one point I would like to make, Your  
18 Honor, and it is not hitting me. I think I actually hit  
19 it already now that I look at any notes, the statute of  
20 limitations.

21 I, think first of all, my adversary has  
22 conceded that we are right in the six-year period and that  
23 six months should not be in play.

24 I think we do believe we have a  
25 hypothetical creditor. I do believe we could go back as



1 far as we can as long as we could establish, and it is our  
2 burden and we accept it readily that the Ponzi scheme went  
3 back to the date which all these transactions are in play.

4 I believe the law is in the favor of the  
5 Trustee here to liberally allow him to go back and gather  
6 in all of those fictitious profits, and all of the  
7 misbegotten funds from this Ponzi scheme and to bring them  
8 back in to be distributed, and given the facts of this case  
9 as we have alleged them, I think we are entitled to do  
10 that.

11 Thank you, Your Honor.

12 THE COURT: I have one issue that was  
13 covered by Mr. White, and I didn't hear your responding to  
14 it. The agency theory which you have raised in your  
15 brief, that is really not in the complaint itself.

16 Are you relying on this agency theory to  
17 demonstrate fraudulent intent or are you really saying that  
18 the mere fact of fraud is sufficient in itself.

19 I don't know where are you going in the  
20 agency theory. I could concede that both agents and  
21 principal are involved in some parts of the transaction,  
22 but I have difficulty in trying to separate them, and I  
23 don't know where you are coming from in the complaint which  
24 is not based on an agency theory but perhaps infers it.

25 MR. SHEEHAN: I think it does, and that is

1 what we are trying to do in the brief. Putting aside the  
2 agency and the fact we develop it, I think you are right  
3 about principal and agency here because it can go both ways  
4 in this particular setting as facts develop. But it was  
5 inferred. We are saying these folks were operating with  
6 knowledge of each other because of the fact there is  
7 knowledge of those accounts and they are talking to each  
8 other about them.

9 THE COURT: The principal and agency  
10 theory raises and falls on the degree of control. That  
11 would be both ways. I don't know that the complaint  
12 spells out the control on the part of the principal being  
13 the individual defendants in one issue and Chais being the  
14 principal in another context and having control over all of  
15 these accounts.

16 It may very well be that discovery points  
17 outs that there are agreements, that are oral or written,  
18 that give the individual defendants the right to make  
19 demands to receive funds. But I don't know that the  
20 complaint specifically does that or may be inferred doing  
21 that.

22 I haven't heard from you, but you aren't  
23 condemned for writing on the theory of agency in your  
24 brief, but not in the complaint.

25 MR. SHEEHAN: Well, let me respond very

1 briefly to that, Your Honor. I agree with you it is not  
2 detailed in the complaint. Mr. White points that out as  
3 well. As best I think it is, as Your Honor suggests, it  
4 is inferred. Clearly, I think we would have the right  
5 through discovery to determine through the documents that  
6 Your Honor has alluded to whether that exists or not.  
7 What we were arguing in the complaint, which I think is a  
8 fair argument is the fact that the knowledge that Mr. Chais  
9 had, which clearly he had, I don't think anyone is  
10 disputing that here, quite frankly, given the fact he was  
11 working as he was with his family and doing what he was  
12 doing, that knowledge could be imputed. I think we have  
13 the right to prove that.

14 That allegation is predicated upon an array  
15 of facts, and that is that all these accounts over all  
16 these years, the manipulation of those accounts by Mr.  
17 Chais, and we do allege that he was in fact manipulating  
18 those accounts and directing them. There is no question  
19 if in so doing that, he did it with the knowledge of the  
20 accounts, and in doing that, that knowledge gets imputed.

21 That is where we are, Your Honor.

22 THE COURT: Okay.

23 Mr. White, do you want to respond?

24 MR. WHITE: Just a couple of quick points.

25 First, it is not our role to dispute what is known or not

1 known what Stanley Chais did in the proceeding. I feel I  
2 would be remiss --

3 THE COURT: I know Stanley Chais is not a  
4 movant for dismissal.

5 MR. WHITE: He is also not my client. He  
6 has a lawyer in the room. I presume he will deny the  
7 allegations in the claim when the time comes, I don't want  
8 the record to stand uncorrected he didn't dispute it. It  
9 is not time to dispute it. When the time comes we will  
10 have to decide what to do and what is appropriate under the  
11 circumstances. We should not take it as a given as it  
12 seems as counsel to the Trustee is suggesting that Stanley  
13 Chais did all of these things. I don't know whether he did  
14 or did not.

15 My facts are as they are alleged in the  
16 complaint. Okay, that's fine for now. The question is  
17 the sufficiency of the allegation, not the truth of the  
18 matter of the facts as they are asserted thus far.

19 It seems to be at the heart of Mr.  
20 Sheehan's argument is that this is a family and they talk  
21 to each other. I am not sure what else might be implicit  
22 in the mishpocha, not having expertise in Yiddish.

23 THE COURT: I don't know how it figures out  
24 in the record. I don't know, it wasn't spelled out and I  
25 am not sure the reporter knows it.

1 MR. SHEEHAN: I will submit it separately.

2 MR. WHITE: To the extent it is what he  
3 says, and there is not something laden in that other than  
4 these people are family, the allegation that these people  
5 talk to each other. You have to be kidding me, that is the  
6 basis of suing someone for \$300 million for publicly  
7 humiliating them and saying they are were active  
8 participants in an ugly scheme like this? They talk to  
9 each other because they are family members. By the way,  
10 the allegation that they talk to each other is not in the  
11 complaint. It didn't get in there.

12 I would like to know what basis for the  
13 imputation that Mr. Sheehan talks about that they plead  
14 because if all it is, people in families talk to each other  
15 it seems to me that Mr. Sheehan needs to or the Trustee  
16 needs to know some more about the Chais family before they  
17 could make that allegation.

18 THE COURT: Well, his argument is that the  
19 complaint is sufficient enough to embark on appropriate  
20 discovery.

21 If he fails in the discovery, then he is  
22 exposed to a plea for summary judgment. So what we are  
23 really dealing with today is whether there is enough here  
24 to embark on appropriate discovery. Family relationships  
25 as an inference is pretty strong in that regard.

1 To look into those family relationships may  
2 be that sufficient pleading here that suggests discovery is  
3 appropriate under those circumstances. He may never  
4 succeed in showing that these people were nothing more than  
5 distantly related people on the street that got the largess  
6 of Stanley Chais just because he felt like doing something  
7 good for someone.

8 On the other hand, a family relationship  
9 and bond might be strong enough to create the inference  
10 that there is this relationship.

11 MR. WHITE: Well, Your Honor, I think we  
12 have come to a sad day, frankly, by the fact that you are  
13 related to someone would allow a quasi-government official,  
14 if you will, to force you to the burden of explaining in a  
15 public place your family relationships. There needs to be  
16 a basis for saying these people knew, and the fact your  
17 father is whoever he is, is not a basis standing alone for  
18 that or even the proper basis for an inference or pleading.

19 THE COURT: It may very well be that you are  
20 correct, but we shouldn't be doing that until there is some  
21 discovery.

22 MR. WHITE: I think you have to plead  
23 something and have a good faith basis for pleading it.  
24 These are things that are missing in the claim. The fact  
25 that you are saying they are in the family, it is not that

1 sort of basis. I would be very disappointed to find out  
2 that I could be held responsible for what my father did on  
3 the way to work this morning, when he had a car accident.

4 THE COURT: The fact is you are not going  
5 to establish it.

6 MR. WHITE: There is a huge expense  
7 involved in this kind of discovery that the Court is  
8 contemplating. My clients lost all of their money just  
9 like all the other victims that Mr. Picard represents, and  
10 for them to have to defend what seems to be a lawsuit not  
11 based on much more than or other than association, which is  
12 like we would like to say, is not a basis in the American  
13 system for proceeding, thereby a basis for putting people  
14 to the burden of defending this kind of a lawsuit. The  
15 Trustee needs to come up with something more, whether the  
16 source of the money, meaning whether it came from Stanley  
17 Chais or some other person is irrelevant to the purpose of  
18 a fraudulent conveyance. The question is what happened in  
19 the accounts between Madoff securities on the one side and  
20 my clients on the other.

21 The fact that the source of that funding of  
22 those accounts came from Stanley Chais is not related to  
23 that inquiry. The idea Stanley Chais felt akin to them  
24 and gave them money is not part of the fraudulent  
25 conveyance analysis. That is a question of showing if that

1 was intentional and people knew what was going on. If it  
2 is constructive that reasonable people would have noticed  
3 it. It is a relationship between them and Madoff  
4 Securities, not between them, their father and Madoff  
5 Securities.

6 I would urge the Court to look past that.

7 Beyond that, Your Honor, I don't think I  
8 have anything further to add. At this point I guess we  
9 will rest and move on to the next motion.

10 MR. SHEEHAN: I have one brief thing to say  
11 just in response to this. It will take only 30 seconds.

12 Sometimes in the course of the argument we  
13 seem to lose our way, the basic principles. This is a  
14 motion to dismiss.

15 We allege Stanley Chais stole hundreds of  
16 millions of dollars. We alleged that is all fictitious  
17 profits. We have alleged that all those accounts, dozens  
18 and dozens of those accounts in the name of his clients,  
19 it's not their money, it is other people's money, they  
20 didn't lose their money. They lost money that belonged to  
21 other people. That is all alleged and that is all true  
22 for the purpose of this motion. That alone sustains us  
23 today. All of the others, it is just power techniques  
24 asserted with this at this point, but the basic principle  
25 in this case is the allegation of hundreds of millions of



1 dollars being taken away from other people and the Trustee  
2 seeks to get it back.

3 Thank you, Your Honor.

4 MR. WHITE: I have one more thing. If we  
5 could finish up with my people, first Tracy.

6 On the agenda is the motion we made by  
7 Mirie Chase to dismiss for lack of personal jurisdiction.  
8 This will take about 20 seconds.

9 The bottom line is this woman had an  
10 account in Madoff. She is an Israeli citizen who has no  
11 contacts otherwise in the United States.

12 Apparently on the issue of what personal  
13 jurisdiction is, while Stanley Chais was her agent, we are  
14 led back to the question about agency, of course not found  
15 in the pleading. It is the burden of the plaintiff to lay  
16 a basis for proper jurisdiction. None has been alleged  
17 here, Your Honor.

18 The theory argued in the motion, in the  
19 papers in opposition is inconsistent with the basis alleged  
20 in the complaint.

21 So, Your Honor, on that basis we would say  
22 Ms. Chais ought to be dismissed in the case for lack of  
23 personal jurisdiction.

24 MR. HIRSCHFELD: Good morning, Your Honor.  
25 Marc Hirschfield, from the law firm of Baker Hostetler, on

1       behalf of the Trustee.

2                       This is not the first time in this case  
3       that Your Honor has had the chance to consider personal  
4       jurisdictional issues.

5                       In fact, Your Honor, just a few months ago  
6       the Court issued a ruling in that context of another of the  
7       Trustee adversary proceedings that ruled upon a motion to  
8       dismiss for personal jurisdiction.

9                       That was in Picard v Cohmad, and reported  
10      at 418BR75.

11                      In that decision the Court overruled the  
12      motion to dismiss of two Swiss entities and found that the  
13      Court had jurisdiction over them.

14                      The standard is set forth in Your Honor's  
15      ruling, so I won't repeat it here today, but the Trustee  
16      easily meets that burden.

17                      As a matter of fact, the facts are just as  
18      compelling if not more so than the case in Cohmad.     Just  
19      briefly the facts are these.

20                      Mirie Chase -- and I would note that in  
21      Madoff's records Mirie is spelled M-I-R-I-E versus M-I-R-I.  
22      But these two accounts in BLMIS the first was opened in her  
23      name and what we think was her Social Security number and  
24      her address in Israel.   There is a checkmark in the box of  
25      agency and it has Stanley Chais' name as being her agent.

1 Based on that, we could infer that we have alleged that  
2 Stanley Chais is her agent.

3 Over the five-year period that Mr. Chais  
4 maintained this account there are at least 11 transactions  
5 in the account. Money came in and money went out and  
6 there was a transfer to another account, which I will get  
7 to in a second.

8 One of the transactions I mentioned was a  
9 check was made payable to Ms. Chais personally, a \$20,000  
10 check in April 2003, and in all this account was a net  
11 winner of more than \$288,000.

12 Let me mention a transfer out.

13 Well, in November of 2004, Ms. Chais  
14 transferred \$340,000 out of her account and closed it. It  
15 was transferred to another account, with her husband, Mark  
16 Chais, who I should mention is her husband, and Mark Chais  
17 and Stanley Chais' son. So she is Stanley Chais'  
18 daughter-in-law. That joint account was held in her name  
19 and her husband is as joint tenants.

20 That account had a spectre of transactions,  
21 more than 50 transactions in total between the time she  
22 became a joint tenant in the account when Madoff collapsed  
23 in 2008.

24 As a matter of fact, that account was a net  
25 winner of 13 and-a-half million dollars.

1                   So based upon these facts which the Court  
2                   on a motion to dismiss on jurisdictional grounds treats that  
3                   as true, the Court has clear jurisdiction over Mr. Chais.

4                   As I said, the Court in Cohmad cited a  
5                   standard. I won't repeat it here. But clearly, the  
6                   allegations are that Ms. Chais' conduct was such that it  
7                   relates to BLMSI and her actions do and, therefore, the  
8                   Court has specific jurisdiction. It is clear she is  
9                   acting individually or acting through her or through her  
10                  husband directed transactions in these accounts. This is  
11                  not a bad investment.

12                  Certainly Madoff would from time to time  
13                  give money out to people who would ask for it, but you  
14                  would have to ask for it, he didn't give money out  
15                  indiscriminately.

16                  Clearly, the fact there were redemptions  
17                  and transfers, someone had to ask for them. Ms. Chais  
18                  said she did not personally ask for them, and I don't know  
19                  whether that is true or not. We did not have discovery  
20                  yet, either she or someone acting on her behalf did because  
21                  we know the money came out.

22                  Once we get a prima facie case of showing  
23                  that we had the jurisdiction they had the burden of going  
24                  forward showing they don't and they have not met that  
25                  burden.

1                   What the court also has to do is to look to  
2                   see whether jurisdiction is reasonable under the due  
3                   process grounds for the same reason that the Court found in  
4                   Cohmad we found it is reasonable to exercise jurisdiction,  
5                   that is equally applicable here.

6                   One thing I want to note is that is not in  
7                   our papers. In the Cohmad decision Your Honor is citing  
8                   your prior decision that was reported at 63-BR422, it was  
9                   noted that it is possible for a person to waive  
10                  jurisdictional issues and, in fact, filing a notice of  
11                  appearance could do that.

12                  Well, in fact, the notice of appearance was  
13                  filed on behalf Ms. Chais, is Mirie Chase as a party. In  
14                  docket 13 in the case a notice was filed on her behalf as  
15                  well as other defendants represented by counsel.

16                  On that basis alone we believe the Court  
17                  properly could exercise jurisdiction here.

18                  For all these reasons we think the Court  
19                  clearly had jurisdiction and the Court should exercise good  
20                  judgment and allow this lawsuit to go forward.

21                  Thank you, Your Honor.

22                  MR. WHITE: I have a two points to make,  
23                  Your Honor. One, with regard to the stipulation and the  
24                  waiver, I have never heard of this before.

25                  I recall this was an issue for us at the

1 time we were entering appearances. I need time to go and  
2 check the records because it certainly was not the  
3 intention on our part because we were aware of this issue  
4 at the time we were doing that. So I am caught unaware at  
5 this time by that argument.

6 The other point that I would like to make  
7 to the Court is Mr. Hirschfield spoke about how it is not a  
8 passive role. Mrs. Chais has said it is a passive role,  
9 that she does not ask for or direct any activity with  
10 regard to these accounts.

11 There is nothing in the pleading to the  
12 contrary, Your Honor. Again, you are asking for things  
13 that are not in there to fill in the gaps that could have  
14 easily been plead properly.

15 So from there we say, Your Honor, that the  
16 Trustee has not met the burden.

17 MR. KLESTADT: Good morning, Your Honor.  
18 Tracy Klestadt, from the law firm of Klestadt & Winters.  
19 We represent Michael Chasalow, and have filed a separate  
20 motion to dismiss.

21 Your Honor, on the 51-page complaint, only  
22 paragraph 38 mentions Michael Chasalow. And if I may quote  
23 for the record it is the fourth line:

24 Defendant Michael Chasalow is a person  
25 residing in Los Angeles, California. On information and

1 belief Michael Chasalow was the husband of Emily Chasalow.  
2 On information and belief Michael Chasalow is the  
3 registered agent for the Brighton Company (phonetic) and  
4 for his family foundation and an officer and/or director of  
5 Onedaga, Inc. (phonetic).

6 Your Honor, that is the only mention  
7 Michael Chasalow in the entire complaint. Michael  
8 Chasalow's name does not appear in the schedule of  
9 transfers because we received no transfers.

10 Your Honor, this is a perfect example, as  
11 Mr. Sheehan is referring to earlier, of a complaint that  
12 does not provide a road map for allegations against Mr.  
13 Chasalow because there are no allegations of fact against  
14 Mr. Chasalow.

15 Mr. Chasalow happens to be a respected  
16 professor of law at the UCLA law school. His finances are  
17 separate from those of his wife.

18 He is not alleged, Your Honor, to be a  
19 Trustee of any of the family trusts. There are no factual  
20 allegations that he received any funds or that he directed  
21 the transfer of any funds.

22 He is not alleged to be an immediate  
23 transferee or subsequent transferee.

24 In the response that was filed by the  
25 movant there is a statement alleging that Mr. Chasalow may

1 have had joint control or access to joint accounts but it  
2 is not pled in the complaint. This is a situation where  
3 the assertion is guilt by association or guilt by family  
4 relation.

5 There is no factual allegation in the  
6 complaint whatsoever, Your Honor. This is no road map  
7 and, I believe, Your Honor, it does not meet the requisite  
8 detail of pleading anything to survive our motion to  
9 dismiss.

10 I would request Your Honor to entertain our  
11 motion.

12 Thank you.

13 MR. HIRSCHFIELD: Good morning, Your Honor.  
14 I am still Marc Hirschfield from Baker Hostetler, so far as  
15 I know.

16 In a nutshell, Mr. Klestadt argues that  
17 because Mr. Chasalow does not have his own account at BLMIS  
18 he could not be held liable in our complaint. This is a  
19 very narrow and impermissible view of the law.

20 In fact, the complaint alleges that Mr.  
21 Klestadt mentioned that Mr. Chasalow is related to Emily  
22 Chasalow Chais, Stanley's daughter and he is a registered  
23 agent for the Brighton Company, and is either an officer of  
24 director of Onedaga and the Chais family foundation. These  
25 entities withdrew millions and millions of dollars from



1 BLMIS and Emily had at least 11 accounts at BLMIS that is  
2 either an account holder or beneficiary for, and they  
3 withdrew more than \$51 million since January of 1997.

4 The complaint does allege that all but one  
5 of those accounts after 1998 went into a bank account for  
6 Emily Chais.

7 Now, I will get back to that in a second.  
8 The Trustee has alleged facts that show Mr. Chasalow's  
9 relationship to various entities that are named in the  
10 complaint.

11 We have the right to seek the return, the  
12 avoidance of return of transfers to initial transferees and  
13 subsequent transferees.

14 We have had no discovery here at all, as  
15 Your Honor knows, and we are entitled to discovery to find  
16 out exactly which transfers may have been gone to Mr.  
17 Chasalow.

18 We know that some did -- and I will get to  
19 that in a second -- but we know for a fact that some did.

20 The complaint does put him on notice we are  
21 seeking in paragraph 166, the return of payments of  
22 commissions or fees of transferring from one account or  
23 another or by some other means.

24 Clearly, Mr. Klestadt knows he is being  
25 sued for fraudulent transfer and that is either as an

1 initial transferee or subsequent transferee.

2 I mention that discovery here is  
3 appropriate. At the time we filed the complaint we have  
4 information as to where Mr. Chasalow may have gotten  
5 transfers. We have since learned, on at least one  
6 occasion, that \$6.4 million from Emily Chais, she withdrew  
7 from BLMIS went to a joint bank account with Mr. Chasalow.  
8 So clearly it went to a joint bank account, where he had  
9 control over those funds and would be an initial  
10 transferee.

11 Had we not found this out independently we  
12 could not have known it or alleged it. At the time we  
13 filed the complaint we didn't yet know that. By discovery  
14 we will found out exactly which transfers Mr. Chasalow had  
15 gotten as an initial transferee and which ones he got as a  
16 subsequent transferee.

17 Clearly, the complaint lists a slew of  
18 transactions, and he has exclusively knowledge of, which  
19 monies he may have received.

20 It is not appropriate to hold a Trustee to  
21 a burden where he can't make allegations because he is not  
22 taking discovery and does not have the information. The  
23 information is in their hands and they know it. We will  
24 learn it through discovery. We would submit that the  
25 reading of the law presented by the defendant here is

1 impermissibly narrow and we should be allowed to go forward  
2 with discovery and to establish which transfers Mr.  
3 Chasalow got through discovery as the initial transferee  
4 and which funds he received as a subsequent transferee, and  
5 then seek to avoid those transactions.

6 Thank you, Your Honor.

7 MR. KLESTADT: Just very briefly, Your  
8 Honor, the complaint does not say that.

9 THE COURT: -- well, that is true, the  
10 complaint doesn't say it. The brief does. I have looked  
11 at the brief.

12 All these new facts are in there. I could  
13 just say I grant your motion with the right to replead  
14 because I think the new facts do justify sustaining the  
15 complaint. This could be a waste of time, but if that is  
16 the way it ought to be, I could do that.

17 MR. KLESTADT: I think given the fact they  
18 have lumped my client in with this --

19 THE COURT: Now, you have separate facts  
20 that bring your client into the focus of the Trustee's  
21 complaint.

22 MR. KLESTADT: We may warrant a separate  
23 motion, so the Court may focus on what specifically would  
24 be applicable or not applicable to my client.

25 THE COURT: As I say, I could grant your

1 motion but that just brings us back to unless you could  
2 stipulate and direct the Trustee to replead with respect to  
3 your client, based upon the old facts and the new facts  
4 that have been admitted in discovery.

5 MR. KLESTADT: I could take that up with  
6 my clients. We raise that issue and, in fact, we raised  
7 the issue of the Trustee repleading the case, but that was  
8 rejected.

9 THE COURT: That would save everyone in the  
10 case a lot of time and effort if you would let the Court  
11 know.

12 MR. WHITE: I think we need a change of  
13 personnel, now, Your Honor.

14 MR. KLESTADT: May I be excused, Your  
15 Honor; I have an 11:30 before Judge Gonzales?

16 THE COURT: Go ahead.

17 (Brief recess.)

18 MR. HIRSCHFELD: Judge, one thing before  
19 Mr. Eyre argues the motion to dismiss the counterclaims.

20 Counsel has asked me to withdraw our  
21 reliance on the pleadings on the appearance as a basis for  
22 jurisdiction. We did not give him a copy of that last  
23 night and we apologize for that. We will withdraw that  
24 argument. It is what it is.

25 MR. EYRE: Your Honor, may it please the

1 Court, Paul Eyre, from Baker Hostetler, representing the  
2 Trustee.

3 We have a motion to dismiss the  
4 counterclaims filed by Stanley Chais, the father, his wife,  
5 Pamela Chais, and various Appleby entities that are  
6 controlled by Pamela Chais and the 1991 Chais family trust.

7 Those entities, Your Honor, answered the  
8 complaints and filed a four-count counterclaim.

9 The four counts of the counterclaim are  
10 tortious interference with business relations, conversion  
11 and the Fifth Amendment count that is some form of due  
12 process for the denial of counsel.

13 All four counts are predicated on one  
14 single act.

15 That is, Your Honor, the act of the Trustee  
16 in sending a letter to Goldman Sachs on March 6, 2009.

17 A March 6 letter was sent to Goldman Sachs,  
18 among other entities and basically that letter was sent to  
19 put Goldman Sachs and others on notice of the Trustee's  
20 position regarding assets that they may have obtained  
21 directly or indirectly from BLMIS.

22 Your Honor, it was also in the letter, the  
23 letter was also sent to put Goldman Sachs and others on  
24 notice of the automatic stay.

25 The letter was sent pursuant to the

1 Trustee's exercise of his fiduciary duties. In fact, some  
2 would argue his obligation to send the letter to assist him  
3 in marshalling the assets that would come into the estate  
4 and be distributed among those individuals who lost  
5 millions of dollars.

6 This is not the time for me to give the  
7 opening statement on Stanley Chais. I will resist that  
8 urge, Your Honor. The Court has heard enough about Mr.  
9 Chais' relationship going back 30 years with Mr. Madoff,  
10 it's been a close association.

11 I will however briefly explain to the Court  
12 that the money is what is in the counterclaims, they are  
13 complaining of the access of money. The way the money  
14 worked at the end was really quite simple.

15 The money would come out of Madoff, and it  
16 would go to City National Bank in California.

17 City National Bank in California would then  
18 have two buckets, or at least it was essentially two  
19 buckets.

20 One bucket was for Chais family, all the  
21 entities that are Stanley Chais, his wife, his children.  
22 All those entities.

23 The second bucket was called the arbitrage.  
24 That was what it was called by Madoff. But that is three  
25 entities, Pompom (phonetic), Landover and Brighton. They

1 are entities in California where investors, people come  
2 into these entities and for 30 years, or more than that,  
3 perhaps, Stanley Chais was the one that these investors  
4 gave their money to. He, in Your Honor, would give the  
5 money to Madoff.

6 There was only a brief time when Stanley  
7 Chais did not have that role. That is when he was sick.  
8 I believe he went to Israel for a period of time and  
9 installed his son Mark as the individual in charge of  
10 Pompom, Landover and Brighton.

11 In any event, the money would come out and  
12 be disbursed and money would actually go back to Stanley  
13 Chais as his percentage of the Pompom, Landover and  
14 Brighton. If they did well, above 10 percent, which they  
15 always did, he got a particular account.

16 Money would also go from City to an account  
17 that Mr. Chais had at Goldman Sachs and that is in two  
18 parts. One I will call the liquid account, it has the  
19 liquid assets. The other is partnerships, real estate  
20 partnerships. So what happened here is, and it is very  
21 important for these counterclaims that there is no  
22 allegation, none, that the Trustee took money, that the  
23 Trustee took property, that the Trustee exercised control  
24 over any account.

25 There is no allegation, in fact, that the

1 Trustee had the power, had the authority or in any way  
2 stopped money from going out of Goldman Sachs to Mr. Chais.

3 What happened is as follows. The Trustee  
4 sends a letter and the Court I am sure is aware of these  
5 types of letters.

6 In that letter, the Trustee details his  
7 legal position, relies on statutes. He spells out the  
8 statutes.

9 He cites case law, Your Honor, and he says  
10 this is our belief as to the current situation.

11 Goldman Sachs then makes an independent  
12 decision, or it's apparently an independent decision, to  
13 not allow money to go out to Mr. Chais.

14 That was a decision, Your Honor, that  
15 Goldman Sachs made. These counterclaims also claim that  
16 because the letter was sent, Goldman Sachs was caused to do  
17 something.

18 I submit, Your Honor, that is facially  
19 implausible for a number of reasons. Number 1, as Mr.  
20 Chais is fully aware, there were millions of dollars  
21 potentially owed on those real estate investments. And  
22 what has been happening over time, as Madoff gave the money  
23 to Chais, Chais was able to use that money to make his  
24 capital calls to Goldman.

25 When Madoff dried up, I am positive that



1 Goldman Sachs considered its own position and decided, gee,  
2 we better worry a little bit about the pocket of money  
3 sitting here, in case Mr. Chais is unable to make a capital  
4 call.

5 So Goldman Sachs itself decides they won't  
6 allow the money out. Now, in fact, just so we are clear,  
7 in fact, and this is important, money has gone out.  
8 Plenty of money has gone out.

9 The Trustee even after the receipt of the  
10 letter sent a letter to Goldman Sachs saying: The Trustee  
11 agrees for money to come out for living expenses, medical  
12 expenses. In fact, as Your Honor knows, in September of  
13 2009, Mr. Chais filed a motion to the Court, an order to  
14 show cause. We countered with a TRO.

15 There was an agreement reached, a consent  
16 decree reached at this point, a consent order that  
17 basically establishes a system for money going out for  
18 counsel fees, for medical expenses, for living expenses. So  
19 all of that is ongoing at the moment.

20 Getting back to the letter itself, I think  
21 everyone now, and by everyone I mean certainly the Chais  
22 entities and the Trustee, by which the Chais entities  
23 conceded that the sending of the letter itself would not be  
24 a tortious act. And I think they would agree that the  
25 sending of the letter would not be a tortious act. That

1 is consistent with a number of cases cited in our brief.  
2 The Kush (phonetic) case indicates, Kush must also  
3 establish that the Trustee intentionally interfered with  
4 the performance of her contract without an economic or  
5 legal excuse or justification.

6 The recovery for a tort is not allowed  
7 absent a showing that the defendant intended to harm the  
8 plaintiff without an economic or legal excuse or  
9 justification.

10 I believe that in their papers that Chais  
11 has conceded that is indeed the sending of the letter is  
12 indeed what the Trustees are required to do. That is part  
13 of their job to marshal assets. So the actual sending of  
14 the letter we believe, and I think it is conceded, cannot  
15 be a tortious act. The Chaises go on to say that perhaps  
16 we conceded that, but the letter itself contained a  
17 misrepresentation. As best I am able to tell, they claim  
18 that the letter misrepresents the definition of customer  
19 property under 78fff2C3.

20 I will not argue that issue here today.  
21 The Court is well aware of the Trustee's position, that  
22 indeed assets sitting at Goldman Sachs on behalf of Mr.  
23 Chais is customer property.

24 But regardless of that argument, Your  
25 Honor, there could be no question that the Trustee acted in

1 good faith, good faith belief and that it was legally  
2 justified in sending the letter.

3 The argument on Goldman Sachs is also that  
4 it is facially implausible that Goldman Sachs upon  
5 receiving the letter of the Trustee would not do its own  
6 work, would not consider itself its own legal position,  
7 would not examine its contract, would not do the things  
8 that a Goldman Sachs would normally do.

9 In fact, when you read the counterclaim it  
10 becomes obvious that one of the reasons the counterclaim  
11 fails in addition to what I just stated. Is that there was  
12 no breach.

13 You can't have a tortious interference with  
14 a contract, if the contract itself was not breached.

15 There are many references in the  
16 counterclaim and in the document filed by the Chaises that  
17 reference the agreement with Goldman.

18 We believe Your Honor can indeed look at  
19 that. It was not attached to the counterclaim, but it was  
20 attached to our papers.

21 This document it is very clear, Your Honor,  
22 that Goldman Sachs reserved the right on its own to  
23 withhold funds. There was no breach. There has been no  
24 breach of this contract.

25 From March, the receipt of the letter by

1 Goldman, until September of '09, Goldman could have been  
2 sued by Chais. Chais could have come to this Court.  
3 Goldman could have come to this Court. A lot of things  
4 could have happened, and none happened until September of  
5 '09 when Chais brought a motion before the Court and we  
6 reached an agreement.

7 Even if, for argument's sake, you could  
8 make the argument that the Trustee misrepresented the law  
9 in a letter that was his business judgment to send, and  
10 even if you could argue that the letter caused Goldman  
11 Sachs to breach a contract, which, of course, they didn't  
12 breach, but even if you could make those arguments, we  
13 believe further that the Trustee is immune from a lawsuit  
14 for the sending of the letter.

15 While we concede that the immunity is not  
16 total, there is a qualified asset in the community, but I  
17 can't think of a more relevant thing that a Trustee can do  
18 such as sending this letter that should be protected by  
19 immunity.

20 I mean one could -- the argument has been  
21 made, well, if he intentionally misstated something, if it  
22 was a mistake he abrogates immunity.

23 If everything the Trustee said in the  
24 letter is true, which we believe it is, you don't need  
25 immunity. The reason trustees get immunity is for a

1 mistake, and you don't need that if everything the Trustee  
2 is doing is absolutely correct.

3 In hindsight to go back and you said you  
4 abrogated immunity because we conclude your definition of  
5 customer property is not the definition we believe to be  
6 the case, I think it misses the point entirely.

7 I think that the Chaises go on to say, and,  
8 I believe, this is true, they then make the argument, well,  
9 maybe by a mistake, maybe if the Trustee made an honest  
10 justifiable mistake, he doesn't lose immunity but he will  
11 lose immunity if he intentionally did something, if he  
12 intentionally did something in the letter to misstate the  
13 law.

14 I have a number of responses to that, Your  
15 Honor. The first is that there is absolutely nothing in  
16 the complaint, nothing, that alleges facts that this  
17 Trustee intentionally misstated something in a letter to  
18 try to get Goldman Sachs to do something.

19 Your Honor, there is nothing in the  
20 counterclaim other than the bald assertion that the Trustee  
21 intentionally did something. That is a legal conclusion  
22 and, I believe, the Astroff (phonetic) case in 2009, and  
23 the other case makes it very clear that is not acceptable.

24 Furthermore, it appears to me anyway, if a  
25 Trustee, if the argument is, well, the Trustee tried to

1 fool Goldman Sachs by mistakenly putting a wrong law in  
2 that you have actually put the cases in, you have put the  
3 statute in, the causal connection between that letter and  
4 Goldman's actions must indeed fall.

5 This is Goldman Sachs. If anyone truly  
6 believes that the Trustee is deliberately and intentionally  
7 trying to fool Goldman Sachs into doing something they  
8 otherwise would not do, the Trustee doesn't put in their  
9 cites to the cases, all the things the Trustee did not.

10 I think that is facially implausible. I  
11 think as the Court is well aware, facial implausibility  
12 does matter, it does matter in a complaint.

13 There are two other counts. The count for  
14 conversion, Your Honor, basically, it seems to me that we  
15 took something, that the Trustee took something.

16 There is nothing in the complaint at all,  
17 nothing, factually that would show the Trustee took  
18 anything, had control over anything because he did not.

19 The only act he is accused of doing is  
20 sending the letter. That is the act. The act of sending  
21 a letter cannot control an account that is held at Goldman  
22 Sachs by Mr. Chais. That can't follow.

23 I think the conversion fails also.

24 One thing I failed to mention is even if  
25 the Chaises were able to overcome the immunity, even if

1 they were able to overcome the causal connection, all those  
2 things that I believe are reasons for the counterclaim to  
3 fail, the actual statements in the letter itself are  
4 privileged.

5 There is plenty of good law that says when  
6 a Bankruptcy Court appointee sends out various things,  
7 various letters, the content of those letters are  
8 privileged.

9 The Chais defendants tried to distinguish  
10 those cases. What they say is, well, that is true if the  
11 statements in the letter constitutes defamation and/or the  
12 letter is going to someone who is part of the judicial  
13 proceeding. They said those are the only two times that  
14 you get the privilege.

15 I found nothing in the case law, nothing  
16 that supports the notion that it has to be defamatory, or  
17 could only be letters that go to the proceeding that would  
18 allow you to have the privilege.

19 I believe the privilege would extend to the  
20 content of the letter. That is a further reason that the  
21 motion to dismiss should be granted.

22 The last count, Your Honor, is the Fifth  
23 Amendment claim. As I best understand it, it is as  
24 follows: It appears that the argument is that Mr. Chais  
25 was denied access to counsel, counsel that Mr. Chais has

1 had, the law firm of Loeb & Loeb, for a good 30 years.

2 They are counsel that has been paid out of  
3 the assets. As I understand it, it has been paid  
4 regularly. The Trustee has agreed pursuant to the consent  
5 decree to agree that money will go to pay legal fees.

6 Furthermore, and I think the fact of the  
7 matter is he has always had counsel, he has always had it  
8 all along. I think it is also important, and I don't want  
9 to get hung up on it, but it is true in a civil context  
10 that the defendant is not necessarily denied access to  
11 counsel if he has the right at all for access to counsel,  
12 but it is also not a situation where he simply gets the  
13 counsel of his choice. That is not what the law requires.

14 The other argument, and I wouldn't belabor  
15 the point, the Trustee is not an estate actor doing  
16 something unconstitutionally to Mr. Chais. He cannot do  
17 that. He is not an estate actor.

18 I could argue further, but to sum it up, I  
19 basically say, I think this has to be conceded, the only  
20 thing in the complaint that this Trustee is accused of  
21 doing is that which every Trustee must do, which is attempt  
22 as he knows best to be able to do to marshal the assets of  
23 those people like the Chaises, who have taken out hundreds  
24 of millions of dollars.

25 The Trustee has an obligation to try to get



1 that money back. He is doing what a Trustee has to do.

2 If doing what a Trustee has to do subjects  
3 a Trustee to counterclaims of the sort here, the  
4 counterclaims for conversion, counterclaims for tortious  
5 interference, counterclaims for a violation of someone's  
6 due process right, I would submit to the Court that we  
7 would have a very hard time, having not done its job.

8 Thank you very much, Your Honor, I  
9 appreciate it.

10 MR. LICKER: Good morning, Your Honor.

11 THE COURT: Good morning.

12 MR. LICKER: Eugene Licker with my  
13 colleague, Walter Curchak, from the law firm of Loeb &  
14 Loeb, on behalf of the defendants, Stanley Chais, Pamela  
15 Chais, Appleby Productions Ltd, and some of its related  
16 entities.

17 Going last has a lot of drawbacks, Your  
18 Honor, and it only has one benefit. It allows me to make  
19 some commentary on what went on before, including the  
20 argument I was not a part of.

21 As Mr. White says there is a point where  
22 Mr. Chais' lawyer comes out, and we have denied the  
23 allegation in the complaint that has been submitted in the  
24 answer that is before you today. The answer, the  
25 allegations which are taken as true for the purpose of this

1 motion.

2 The second thing I would say, Your Honor,  
3 with all indulgence and apologies to the court reporter,  
4 the noun that best describes this matter, I don't believe  
5 is mishpocha, but I would choose mishigas. On that note,  
6 and I have given her the spellings, my best guess of  
7 spellings on those.

8 I want to address what Mr. Eyre just had to  
9 say. With all due respect, I would ask you to dismiss  
10 virtually all of it. I have been doing this for 30 years,  
11 and I have to say that this is the first defense of a  
12 motion to dismiss that I heard that went so far into the  
13 facts, and really at this point what I found to be the  
14 Trustee's approach to this entire case.

15 So when Mr. Eyre gets up here and says I  
16 wouldn't rehash the allegations against Mr. Chais, if you  
17 recall in his opening brief, he did just that.

18 He, essentially, asked Your Honor to take  
19 as true not the pleading that is before Your Honor on this  
20 motion, but his pleading. And even if we were assume that  
21 Mr. Chais has done all of these terrible things and  
22 frankly, there is not all that much in the complaint that  
23 is plead specifically anyway, it is all paragraph 1 of 3 in  
24 there. It's all in one paragraph.

25 He has asked Your Honor to accept his

1       allegations as true rather than those in the counterclaim.  
2       Now, as Your Honor well knows, this is a motion to dismiss.  
3       The issue before the Court is not whether we prove our  
4       claims, but whether we stated our claims, and it is our  
5       pleading that is accepted as true.

6                       So when Mr. Eyre goes through and tells you  
7       how the Goldman Sachs account works, how monies were  
8       transferred to City National Bank, leaving aside the fact  
9       that Mr. Eyre is testifying on the basis of pure hearsay,  
10      leaving aside he is not under oath, leaving a stipulated  
11      fact that some of things he has presented as the facts are  
12      wrong, it is all irrelevant.    It is all not competent  
13      commentary on this motion.    This is a motion to dismiss  
14      the counterclaims.

15                     I would ask that Your Honor ignore what Mr.  
16      Eyre tells you about the millions and millions of dollars.

17                     THE COURT:   That is not the real issue  
18      here.    You, I, and Mr. Eyre, know that this matter and  
19      these allegations in the counterclaim come before me and  
20      it's not for the first time, but there is also a history.  
21      This Court has presided over the litigation involving the  
22      Goldman Sachs account, and the consent order with respect  
23      to it.

24                     The real issue here is whether the sending  
25      of that letter was a tortious act and the impact of that

1 and the freeing of the account, is the freeing of the  
2 account an act of volition on the account of Goldman Sachs  
3 that was triggered by the letter or not.

4 The account frankly was frozen, not by the  
5 Trustee, but by Goldman Sachs.

6 I think the law will acknowledge that  
7 Goldman Sachs is a pretty sophisticated target when it  
8 comes to someone claiming an improper or tortious act, and  
9 makes its own judgment as to whether or not it is  
10 appropriate to freeze the account.

11 I think we can conclude that Goldman Sachs  
12 made a judgment on the account.

13 MR. LICKER: Right, Your Honor.

14 THE COURT: Whatever its thinking was, I  
15 don't think it is relevant here.

16 MR. LICKER: Whatever its thinking was?

17 THE COURT: Yes.

18 MR. LICKER: Whatever Goldman's thinking  
19 was?

20 THE COURT: Yes. You will have to assume it  
21 has done due diligence.

22 MR. LICKER: Yes.

23 THE COURT: And you cannot assume that  
24 Goldman froze the account out of ignorance.

25 MR. LICKER: I don't assume anything.

1 THE COURT: These are real issue before me  
2 and I agree with you, I don't care about all of the other  
3 issues. But it does come before me with somewhat of a  
4 history involving the utilization of the money and a lot of  
5 things that are contained in this counterclaim.

6 MR. LICKER: But very much to the point,  
7 Your Honor, I don't know what went through Goldman's mind.  
8 I know what would go through my mind if I were counsel to  
9 Goldman and got this letter, and we will talk about the  
10 contents of the letter in a minute.

11 But that is what trials are for. We will  
12 find out what went through Goldman's mind. We will find  
13 out whether Goldman read these cases and said, you know,  
14 that Baker Hostetler, those people were pretty smart and  
15 got it right or they may have read those cases as we did  
16 and said, you know what, the guys at Baker Hostetler got it  
17 wrong.

18 THE COURT: This is not a lawsuit against  
19 Goldman Sachs, but the Trustee.

20 MR. LICKER: It is not --

21 THE COURT: Perhaps under the old theory it  
22 should be.

23 MR. LICKER: Every tortious interference  
24 case, Your Honor, has two culpable parties. When A induces  
25 B to breach a contract with C, B has breached that contract

1 and is susceptible to, but it does not mean A is not.

2 The question is did the letter that was  
3 sent start a chain of events, of which the inevitable  
4 result was Mr. Chais would lose control of his property and  
5 the answer is yes, that is what we allege and we will show  
6 at trial.

7 Let me read to you, if I might, Your Honor,  
8 just a small portion of this letter. We will ask  
9 ourselves is Goldman Sachs just deciding for itself without  
10 any liability, any culpability on behalf of Mr. Picard or  
11 is there something else going on.

12 It is the last substantive paragraph, but  
13 not the last paragraph, and it is important because -- I  
14 will read the last paragraph:

15 This letter places you on notice, (if you  
16 were not already on notice), that because the funds  
17 constitute, "customer property," not because we think that,  
18 but because they do and, therefore, property of BLMIS  
19 pursuant to SIPA, the Trustee will presume that any further  
20 payment or disposition of the funds by you, whether or not  
21 at the direction of your customer or depository, will, not  
22 might, will be deemed a willful violation of the automatic  
23 stay by the Bankruptcy Court.

24 You are hereby instructed to refrain from  
25 engaging in or permitting any transfers or dispositions of

1 the funds or other monies received from BLMIS without an  
2 order of the Bankruptcy Court.

3 Your failure to abide by this instruction  
4 may subject you and/or the transferee to liability under 11  
5 U.S.C. sections 549 and 550.

6 In addition, any such transfer or  
7 disposition may be deemed by the Bankruptcy Court to have  
8 been made in bad faith and your liability may include  
9 sanctions.

10 Final paragraph, Your Honor. Please  
11 contact me as soon as possible for discuss compliance with  
12 this letter.

13 Signed Lauren J. Resnick, on behalf of  
14 Baker Hostetler.

15 Your Honor, yes, Goldman is smart people  
16 and they have smart lawyers and they read this law, and  
17 they could have decided not to be intimidated by these  
18 bullying tactics but they did not, they did not.

19 The letter, and we will talk about the  
20 substance of the letter in a minute, is wrong. The letter  
21 does what Mr. Picard has done, vis-a-vis Mr. Chais from the  
22 start, which is to presume guilt.

23 The letter leverages off of loose language  
24 in cases that utilize a legal fiction to align the SIPA  
25 statute and Bankruptcy Code so as to avoid technical

1 defenses.

2 It says to the Goldman Sachs of the  
3 world, the money that you hold, irrespective of what we  
4 prove, we have not proved a thing, without a stroke of a  
5 judicial pen, the money that you hold belongs to me, Irving  
6 Picard. It does not belong to Stanley Chais.

7 That is not true, Your Honor. What is  
8 true is the Trustee believes he can prove that is his  
9 money, that he is going to -- and this is in March -- he is  
10 going to interpose a complaint, he did in May, and he says  
11 he will win and maybe he will, I don't believe so but maybe  
12 he wins. And when he wins, then it is his money. But  
13 what he was doing in March of '09 is taking that money,  
14 taking dominion and control of that money. And contrary to  
15 Mr. Eyre's comments, the conversion claim says he took  
16 dominion and control over that money, and that is the  
17 element of conversion. He just took control of the  
18 account:

19 Please call to discuss compliance, please  
20 call me so I will tell you, Goldman Sachs, what to do with  
21 the account.

22 There are lot of lawyers in the room. If  
23 Goldman came to them and said what should I do, it is  
24 no-brainer, don't give Stanley Chais the money.

25 Why? What if the letter is wrong? So



1 what? You want to put up with a lawsuit and pay a lawyer  
2 to defend. No. As night follows day, Goldman did not  
3 only what Mr. Picard knew what they were going to do, it is  
4 what he intended them to do. That is why he sent the  
5 letter.

6 On this motion to dismiss, Your Honor, we  
7 are not here to resolve the facts but to talk about the  
8 arguments. Let's talk about the argument that Mr. Eyre  
9 raises here.

10 First, it is Mr. Picard's duty to marshal  
11 assets. He said we have conceded that. I don't know it  
12 is his duty to send letters but it is his duty to marshal  
13 assets. I have no problem with him sending letters,  
14 telegrams or e-mails. All he has to do is get it right  
15 and not wrong. He has to not take my client's property.

16 But whether he was acting in good faith,  
17 whether Goldman took the time to read those cases and  
18 decided for itself what to do, those are all questions of  
19 fact. That is what trials are for, not things that are  
20 cognizable on a motion to dismiss.

21 Is the letter true or false? We will have  
22 a trial about that. We will find out whether the letter  
23 is true or false. But I would argue that the letter very  
24 clearly is false.

25 What the Trustee has done is taken solace

1 in language in Park South, Hill 1 and Hill 2, that creates  
2 a legal fiction.

3 And we could talk about it but it is very  
4 clear the legal fiction is for purposes of standing because  
5 of the language difference between SIPA and the Bankruptcy  
6 Code. That is it.

7 As the Second Circuit said in Colonial, and  
8 that was not a SIPA case, but it does not matter at all to  
9 this point. The Court says if it were the case that the  
10 property in the hands of the third party were property of  
11 the estate, then you would not need to bring an action for  
12 the Trustee to get it back. You would just take it back.  
13 It is his property.

14 The cause of action, says the Colonial  
15 Court, is the property of the estate, not the property  
16 itself.

17 It still has to go through the process of  
18 convincing you, Your Honor, that it is their property.  
19 That is the step they skipped.

20 By skipping that step, Your Honor, they  
21 have harmed our client. It was certainly Goldman Sachs  
22 that pulled the trigger, but it cannot be said that  
23 language in that letter is merely the Trustee stating his  
24 opinion and saying to Goldman, you do what you want. It  
25 is clear what the intended and the probable result of

1 sending that letter would be.

2 But, Your Honor, that is what we are going  
3 to prove at trial. Is the Trustee immune from suit? No  
4 it is not. The truth is that he is immune for the  
5 exercise of business judgment and this is not a business  
6 judgment. It is not a decision of when to sell or what  
7 price to sell. This is writing a letter, taking a  
8 position that is legally bankrupt and because of that,  
9 causing harm to a third party.

10 Whether it is exercising business judgment,  
11 though, it is a question of fact. That is why we have  
12 trials.

13 Is the letter privileged? I would have to  
14 say this is one of the most creative arguments I have heard  
15 in a long time. But it is also one of the most vacuous.  
16 The notion of privilege and I have litigated a number of  
17 defamation cases, and I believe Your Honor has seen many  
18 more than I have litigated, the notion of privilege is  
19 unique to two causes of action, a cause of action for  
20 defamation and for malicious prosecution. Why? Because  
21 of the nature of those actions in a lawsuit, you are always  
22 putting someone's reputation on the line. You are saying  
23 that someone did something wrong.

24 If you don't privilege those matters, then  
25 no one could ever sue for defamation. That is why it

1 adheres.

2 The Trustee cited no case outside of the  
3 defamation context, with two, well, one exception and one  
4 case that they say it is an exception. The latter is the  
5 Weisman case, which grows out of the OPM leasing, where  
6 Weisman's older brother, Mordecai, sued the trustee. There  
7 were three sentences. It's in the absolutely wonderful  
8 report that's reported by, and I am sure Your Honor is very  
9 well familiar with it.

10 THE COURT: They are still making money in  
11 selling the examiner's and Trustee's book.

12 MR. LICKER: You can get it for free.

13 THE COURT: Can you? The bound copy is  
14 about hundred and some-odd dollars.

15 MR. LICKER: Is that right?

16 THE COURT: I don't get any --

17 MR. LICKER: It is absolutely wonderful, I  
18 keep it on my shelf at all times. I think it is the best  
19 written book on fraud that there ever was.

20 In the report --

21 THE COURT: Just, as an aside, when you talk  
22 about fraud and Madoff, it's kind of sophisticated or  
23 unsophisticated. The OPM fraud was essentially taking a  
24 glass cocktail table, putting a contract on the table, a  
25 flashlight underneath it and then forging the signatures.

1 MR. LICKER: The image of Mordecai  
2 Weissman with a flashlight on the table and then where it  
3 is filled in is etched in my mind. It is a wonderful  
4 case.

5 THE COURT: It is also interesting one of  
6 them ending up marrying the photographer?

7 MR. LICKER: I don't know.

8 THE COURT: We don't know for sure about  
9 the sex of the photographer. It would be interesting to  
10 find out.

11 MR. LICKER: I want to interview the -- I  
12 think Mordecai Weisman is out there, it is very, very  
13 interesting. His brother was mentioned as having a  
14 no-show job, and having complicity in the fraud. There  
15 were three sentences in a several hundred page report. He  
16 sued for defamation and tortious interference and the whole  
17 argument is you defamed me, therefore I can't do business  
18 anymore. It was a defamation case. That is all it was.

19 The only other case that the Trustee has  
20 found where the notion of privilege applies someplace else  
21 is a case out of California applicable to Section 47 of the  
22 California Civil Code that specifically privileges  
23 materials that are presented in Court. That is sui  
24 generis. It has got nothing to do with the case.

25 My favorite argument, which is the next

1 argument the Trustee makes, to the extent the privilege  
2 only applies to defamation cases. Well, this is a  
3 defamation case. The argument is it was about a letter  
4 which has a false statement, that is defamation, that  
5 causes an injury to the counterclaimant. Therefore, this  
6 must be a defamation case.

7 Your Honor, they left out the notion that  
8 the falsehood has to be about the plaintiff. This  
9 falsehood is about money and they have left out the part  
10 about reputation of damage. We are not claiming that.  
11 We are claiming other kind of damages, inability to access  
12 funds. This is not a defamation case.

13 Next, there is no breach. Why do we know  
14 there is not? Mr. Eyre tells us that. He is a very good  
15 lawyer. The fact he has read these contracts and he now  
16 tells Your Honor there is no breach, that is interesting  
17 but irrelevant. That is why we have trials.

18 Indeed there is a breach. There is  
19 nothing in any of those contracts that says any third party  
20 can decide when and if money could be released to Mr.  
21 Chais. But that is for trial. That is not on a motion  
22 to dismiss.

23 Finally, it is Goldman's fault, it is not  
24 our fault. Well, Your Honor, causation. If this letter  
25 had not made its way to Goldman Sachs, I guarantee you I

1 would not be standing here making this argument. We would  
2 not have been before you.

3 In terms of the elements of the various  
4 causes of action there are a couple of technical arguments  
5 that the Trustee makes in their reply brief. I want to  
6 address that because we did have a chance to do it on the  
7 paper.

8 We argue tortious interference with  
9 contracts and business relationships to the extent any of  
10 the relationships between Mr. Chais and Goldman is extra  
11 contract, that it is not dealt with by the contract, the  
12 Trustee comes back and says and this really epitomizes the  
13 Trustee's argument in this case, he comes back and says  
14 there is no allegation of malice. You have to allege  
15 allege malice, and they quote the statute, which means  
16 unlawful means or purpose. They say they have an alleged  
17 malice.

18 We have an alleged unlawful means,  
19 referring to the conduct of the Trustee for sending a  
20 letter that was untrue. That is what unlawful means.

21 We don't say that the Trustee hates Mr.  
22 Chais, that he has hatred or ill will towards him. But  
23 what we said was it was unlawful full means.

24 Mr. Eyre has misconstrued the  
25 constitutional argument of what is happening here. He is

1 remembering when the letter came in and we had some  
2 problems getting money out of Goldman Sachs. As you could  
3 imagine, Your Honor, I might have made it my business to  
4 mention all of this to Mr. Eyre and to ask him to  
5 reconsider. That would all go to good faith. That is  
6 factual, and not before you on this motion. Mr. Eyre is  
7 confusing what went on back then with what we are arguing  
8 now.

9 What we argued back then is, hey, you may  
10 be willing to dole out and make Mr. Chais come out to you  
11 and say, I need to see the doctor this week, can I have  
12 \$100 to pay this bill, and you will say yes. You are not  
13 bad people or trying to kill the man. But they were not  
14 allowing us access to any funds to pay for the legal  
15 defense and it affected the legal defense. Yes, we stayed  
16 on. We wouldn't abandon the client. But it affected the  
17 legal defense.

18 But that is not what the fourth cause of  
19 action is about. It is very simple, Your Honor, under  
20 Intercontinental, you could have private actors that act as  
21 public actors who are subject to the state action  
22 restrictions. This is one of those situations and the  
23 government is not allowed to take your property, which in  
24 this case is control over this account without due process  
25 and that is what they have done.



1 This is not a Sixth Amendment argument, but  
2 a Fifth Amendment argument, and I want to make that clear.

3 Let me close with this. I was here for  
4 the first argument. I heard Mr. Sheehan very passionately  
5 argue to Your Honor about the thousands and thousands of  
6 victims of the Madoff fraud.

7 I can't say anything different. Obviously  
8 a lot of people were hurt here. I have nothing but  
9 respect and Mr. Chais has nothing but respect for the  
10 Trustee and his efforts to try to get money back to those  
11 people. That is a noble effort, and I am glad they are  
12 people who willing to serve.

13 I would suggest that nothing about this  
14 counterclaim will chill anyone's argument about serving in  
15 that capacity, in the capacity as Trustee. I think you  
16 have their fee application on the calendar for this  
17 afternoon that goes to that point.

18 But it does not give this Trustee or any  
19 Trustee carte blanche to skip the judicial process.

20 If Mr. Picard can prove that Mr. and Mrs.  
21 Chais and the Appleby entities, that all of our clients got  
22 money they did not deserve he will get a judgment out of  
23 Your Honor and it will be executable and they will recover.  
24 They have to do those things first, though, Your Honor.

25 What they have done here and what they

1        tried to do without the stroke of a judicial pen is skip  
2        Your Honor and go straight to judgment.    It is pure Alice  
3        and Wonderland, punishment first and trial later.    That  
4        they cannot do, and that is what the Trustee is liable for.  
5        We will try to do that at trial.    We plead adequately the  
6        four causes of actions.    It is fully before Your Honor, and  
7        that is why the motion must be denied.

8                    MR. EYRE:    I will make three brief points,  
9        Your Honor.

10                   On footnote 8 of our papers we cite the  
11        fact that the Chaises reference the account, and the  
12        contract with Goldman Sachs in numerous paragraphs of the  
13        counterclaim.    179 to 182, 184 to 180, et cetera.    It is  
14        also clear law, I believe, that a party should not be  
15        allowed to escape the consequences of its own failure to  
16        attach a document.

17                   I believe the Court can consider that  
18        Goldman Chais agreement in a motion to dismiss and it does  
19        not convert that motion a summary judgment.

20                   Secondly, the Chaises referenced the  
21        Weissman case, this case has to do with privilege.    It says  
22        briefly:    Under the law of New York statements that arise  
23        in the Court of judicial proceedings and are relevant and  
24        pertinent thereto are absolutely privilege.

25                   The privilege protects statements

1 regardless of the speaker's state of mind, knowledge of  
2 falsity or the jury that the statements caused. The  
3 privilege embraces anything that may possibly be pertinent  
4 or which has enough awareness or connection with the  
5 proceeding so that a reasonable man may think it is  
6 relevant. All doubts should be resolved in favor of its  
7 relevancy or pertinency.

8 The third point I will make, in the letter  
9 that the Trustee sent to Goldman and others, there are two  
10 points about the letter that I would just like to just  
11 raise.

12 Number 1, the letter does not mention Chais  
13 in any respect.

14 The second point I would make is the  
15 letter, encourages Goldman Sachs to do its own work and its  
16 own due diligence, which they would do anyway, but the  
17 letter does say, your failure to abide by these  
18 instructions may subject you, et cetera.

19 It also says, in addition, any such  
20 transfer or disposition may be deemed by the Bankruptcy  
21 Court. The idea when you put "may" into this, I would  
22 submit Goldman Sachs would do it anyway, but the Trustee  
23 was encouraged in making its own independent assessment of  
24 the legality here and what they should do about it.

25 Thank you very much for your time, and I

1 appreciate it.

2 MR. LICKER: I am tempted not to say  
3 anything but I am a lawyer and I have to talk.

4 On the Weissman case, I am not sure what  
5 Mr. Eyre's point was, but it applies to something other  
6 than defamation cases, it went a little far. When Judge  
7 Cotell (phonetic) said immunity applies irrespective of the  
8 knowledge of falsity. There is a reason he use that  
9 phrase, because he was addressing defamation and this not a  
10 defamation case.

11 The letter speaks for itself. I will tell  
12 you what I would tell Goldman Sachs. If does not matter  
13 what we think Goldman Sachs was thinking. We will find  
14 that out at trial and at discovery.

15 This is a motion to dismiss. Thank you  
16 Your Honor.

17 THE COURT: There has been very little  
18 discussion about one very important document, which has  
19 been referred to, perhaps obliquely right now, but  
20 paragraph 29 of the customer agreement gives Goldman Sachs  
21 the complete authority to freeze funds at their own  
22 discretion, totally.

23 If you read the rest of that particular  
24 paragraph, they are a very independent actor, and what they  
25 do is to be construed as an act of their own volition.

1 And that may be a very important factor in  
2 my consideration of whether or not these counterclaims  
3 stand,

4 MR. SHEEHAN: Thank you, Your Honor.

5 MR. WHITE: Thank you, Your Honor.

6 MR. SHEEHAN: Your Honor, there is one  
7 last item here. Well, there are quite few of them, it's  
8 the fee applications and we have the Trustee and his  
9 counsel as well as a number of other applications.

10 (Brief recess.)

11 MR. SHEEHAN: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MR. SHEEHAN: This is a return date of a  
14 number of applications for interim allowance of fees on  
15 behalf of a number of parties.

16 There is only one objection that has been  
17 filed that I am aware of. That is in connection with the  
18 application of Mr. Picard and by his counsel, Baker  
19 Hostetler.

20 THE COURT: Well, there is a little  
21 reaction which doesn't really appear to be an objection to  
22 the fees but more to the substance to your rejection of a  
23 claim on the part of one Dr. Rudolfo Dawlt (phonetic) in  
24 Zurich, Switzerland, which if you would look at the way it  
25 is titled, it refers to today's hearing but it seems to

1 really regard this particular claim and Trustee's rejection  
2 of it.

3 So unless there is somebody who could  
4 clarify it, I don't regard this specifically as an  
5 objection to fees.

6 MR. SHEEHAN: Your Honor, I have that  
7 letter as well, I have it on my desk and I read it as you  
8 did. Even though it was captioned a claim, the letter was  
9 characteristically an objection to the claim. I turned it  
10 over to our rejection people and they are handling it.

11 With regard to those applications, Your  
12 Honor, not objected to. I won't go into them. I will go  
13 into a brief detail and I would identify the firms  
14 involved. A number of them are firms retained by the  
15 Trustee in connection with actions instituted in foreign  
16 jurisdictions.

17 The first is Schiltz & Schiltz. The next  
18 is Higgs Johnson Truman Bodden & Company, Eugene F.  
19 Collins, Willaim Barristers and Attorneys as Special  
20 Counsel, Attias & Levy, Lovells LLP and Kugler Kandestin.

21 I will leave these sheets with the reporter  
22 so she could have the spelling of these names, Your Honor.  
23 All of these, these are all foreign counsel and there being  
24 no objection, we would move those applications be approved.

25 I should note for the record that Mr. Bell

1 is here, ready to speak.

2 MR. BELL: Kevin Bell, for the Securities  
3 Investment Protection Corporation.

4 With respect to that cluster of special  
5 counsel, SIPC has filed one recommendation and supports the  
6 amounts requested by those various counsel and would  
7 support the entry of an order approving those requests,  
8 Your Honor.

9 THE COURT: Does anyone want to be heard?

10 Well, definitinally, for the purpose of this  
11 proceeding, I am prepared and I do treat them as attorneys  
12 for the Trustee --

13 MR. SHEEHAN: Yes.

14 THE COURT: -- and they have the same  
15 standing as the attorney for the Trustee for the purpose of  
16 my granting allowance and in considering the position of  
17 SIPC.

18 MR. SHEEHAN: Thank you, Your Honor.

19 The other unopposed application has been  
20 filed by Windels Marx, who is here in Court this morning.  
21 Alan Nisselson and Regina Griffin are here today, Your  
22 Honor.

23 As you well know, Your Honor, they have  
24 appeared already before you in a number of capacities on  
25 behalf of the Trustee.

1 We have been working cooperatively with  
2 that firm in connection with a number of matters, some of  
3 which have involved corporations of which the Madoff family  
4 and other third parties had an interest.

5 Shortly you will be seeing complaints filed  
6 with regard to at least two of them.

7 In addition to them, there are a number of  
8 insiders where we have had conflicts because of their  
9 relationship to the corporate clients that we had. We  
10 felt it was remote but nevertheless appropriate not to be  
11 involved with those particular situation.

12 We have asked Windels Marx to handle those  
13 as well. They are not insignificant preference and  
14 fraudulent conveyance actions.

15 I know that myself and the Trustee had very  
16 much enjoyed working with Windels Marx, but beyond that we  
17 feel there has been work that has been superb and we  
18 strongly move that it be approved.

19 MR. BELL: On behalf of SIPC we filed  
20 another recommendation in support of the fees requested by  
21 Windels Marx and would support an order by this Court.

22 THE COURT: Does anyone want to be heard?

23 I will grant the request by Windels Marx.  
24 It may very well be they come under the same statute,  
25 78fff5c, based upon the consolidation order, and the



1 approval of this Court as well as the real fact that they  
2 have been working as attorneys in sort of a hybrid fashion  
3 and now in a more direct fashion for the Trustee.

4 MR. SHEEHAN: Your Honor, I would just  
5 point out that I will be turning to our application and  
6 that Mr. Picard, the Trustee, would like to address the  
7 Court.

8 MR. PICARD: Good afternoon, Your Honor.

9 THE COURT: Good afternoon.

10 MR. PICARD: Irving Picard, SIPA Trustee.  
11 This is my third application for interim compensation. It  
12 covers the four-month period ending January 31, 2010.

13 For the period I seek a total \$671,591.25,  
14 of which \$570,852.56 would be paid, and \$100,738.69 will be  
15 deferred until the further order of the Court.

16 I also seek reimbursement of actual and  
17 necessary expenses totalling \$77.66.

18 In connection with my fees, I would note  
19 that my fees start with a 10 percent discount for my hourly  
20 rates.

21 In addition, as noted in the applications  
22 that I will address in a little while, there are other  
23 hours that have not been billed for.

24 SIPC has filed a recommendation in support  
25 of the interim fee application. As I noted in my

1 application, the general estate will not be sufficient to  
2 pay administrative expenses, which included paying for the  
3 professional fees which are such as those you have already  
4 approved, mine and Baker Hostetler's.

5 Under the circumstances, SIPC is required  
6 to advance the funds to the Trustee to pay the amounts  
7 awarded. There is no difference between their  
8 recommendation and the amounts applied for. As you noted,  
9 this status provide that the Court should award the amounts  
10 recommended.

11 There is one objection that was filed by  
12 Diane and Roger Peskin, Maureen Ebel and a large group of  
13 investors. As set forth in the response papers that we  
14 have filed, the objection includes a number of arguments  
15 that have previously been rejected by Your Honor.

16 The motion for leave to appeal, the first  
17 fee application order was denied by the district court and  
18 the second one on the second application is still pending.

19 The crux of the objections are as I see it  
20 they are talking about, I have a conflict of interest.  
21 They both stood there and they attempted to bolster their  
22 argument by seeming to say since we have a disagreement on  
23 various legal issues, that both I and Baker Hostetler  
24 should be disqualified.

25 I personally and I am sure Baker does not

1 believe that provides a basis for disqualification and that  
2 is what was set forth in the response.

3 I won't belabor that point, Your Honor.  
4 During the period of my application, a substantial amount  
5 of time was spent in connection with moving customer claims  
6 and dealing with objections to determinations Your Honor.  
7 Your Honor had the briefing in that equity issue which you  
8 decided in March.

9 We started working on the next major group,  
10 by which you have entered a scheduling order in April, that  
11 will be heard during the fall.

12 Before that time, Your Honor, you will be  
13 seeing other objections coming before the Court on matters  
14 that do not raise some of the nitty-gritty issues and some  
15 of the more difficult issues and don't all fit together in  
16 one package.

17 The task of recovering assets is ongoing  
18 and, as you know, it is international in scope. As you  
19 have heard, we have six or so foreign counsel, many of whom  
20 have been instrumental in helping us locate people to  
21 depose and also helping us follow the trail.

22 My activities are generally set forth in my  
23 application. I also would refer Your Honor to the amended  
24 third interim report that was filed in April.

25 Next, turning to the claims, we received

1 16,312 customer claims from persons claiming to have lost  
2 money in the Ponzi scheme. That, of course, includes a  
3 substantial number of people who are relying on their  
4 November 30th statements.

5 As I previously reported, Your Honor, in  
6 December of 2008, there were approximately 4,900 accounts  
7 that were opened. Thus, if you look at the bare numbers,  
8 we have received more than 11,400 claims from persons who  
9 did not have accounts in their respective names.

10 Many of these latter people were entities  
11 invested through various types of funds, including pension  
12 or profit-sharing trusts, family partnerships, limited  
13 liability companies and the like.

14 Each claim has a story and each one is  
15 reviewed before a determination letter is sent out.

16 As of January 31, we had determined 11,861  
17 customer claims, allowing claims for more than 4.55 million  
18 and SIPIC, at that point, it committed approximately 629  
19 million dollars for advances.

20 I am pleased to report that as of April 30,  
21 those numbers have increased.

22 On January 31, we had determined  
23 approximately 72.7 percent and as of April 30, the number  
24 is above 76 percent.

25 SIPC's commitment now is up to over 682.8

1 million dollars.

2 In addition, during that period we resolved  
3 a number of avoidance matters without requiring litigation  
4 for an amount totalling approximately 262.4 million  
5 dollars.

6 Since then, there have been other  
7 recoveries, including 220 million dollars from the Levy  
8 family, and other recoveries that have been made during the  
9 claims processing period.

10 We are very hopeful, Your Honor, in the  
11 very near future we will be announcing some significant  
12 settlements that will put us in a position to do an  
13 allocation and an interim distribution to customers. We  
14 are hopeful that the application will be filed and we could  
15 have a hearing as of, perhaps, as early as late summer or  
16 early fall.

17 As set forth in my application during the  
18 four-month period, the major areas in which I devoted time  
19 out of the 947.7 hours, approximately 30 percent was spent  
20 in connection with claims review.

21 Approximately 154 hours in attending to  
22 various Bankruptcy Court matters.

23 133 hours were in case administration.  
24 About 10 percent of the time was concerned with the  
25 Trustee's investigation.

1 Based on my normal hourly rates during the  
2 period I would be seeking expenses of 746,000 plus dollars.  
3 But as I have indicated previously, I agreed with SIPC to  
4 reduce my hourly rate by 10 percent. That is a reduction  
5 of about \$75,000. So as a result, I'm requesting  
6 \$671,591.25 of which \$100,738.69 would be deferred.

7 Additionally, in consideration of good  
8 billing practice I have written off or not billed  
9 approximately \$117,000. I seek the discounted amount at  
10 this time.

11 I would also seek \$77.66, which are related  
12 to some long distance telephone calls and travel. As in  
13 lawful travel. In the past, as I have indicated, in both  
14 the application and to the Court, I will pay over to Baker  
15 Hostetler the full amounts of any interim compensation  
16 expense reimbursement that is awarded or paid.

17 As I noted at the outset, SIPC has filed  
18 its recommendation in support of the Trustee's application.

19 I would be happy to answer any questions  
20 that Your Honor may have.

21 THE COURT: Does anyone want to be heard?  
22 Thank you. Thank you, Mr. Smith.

23 MR. SMITH: We have an objection to both  
24 Mr. Picard and Baker Hostetler. So maybe it make sense  
25 for Mr. Sheehan to go on now and speak on behalf of Baker

1 Hostetler.

2 THE COURT: Very well.

3 MR. SHEEHAN: The arguments are well stated  
4 in the pleadings. Fees of \$23,884,085.25 is being sought  
5 and expenses of \$390,204.85 satisfied. The same arithmetic  
6 applies for counsel to the Trustee, as far as the discount  
7 and 15 percent holdback, Your Honor.

8 It is almost impossible for me here to  
9 summarize exactly what we have done. We have submitted to  
10 your Honor unredacted time sheets which are voluminous as I  
11 know Your Honor knows.

12 Suffice it to say there are multiple facets  
13 to this case requiring the attention of many attorneys.  
14 The difficulty in summarizing that is the size of it.

15 We have the customer claim process, for  
16 example, and right now there are over 2,700 objections, and  
17 that does not include the 1,900 that were filed with regard  
18 to the customer status issue that is part of the scheduling  
19 order.

20 In addition to that, Your Honor, there are  
21 4,000 outstanding claims all of which have been to be  
22 determined at this time. Many of which involve, Your  
23 Honor, individual issues, as Mr. Picard has indicated, of  
24 ownership.

25 All of those require both a legal and

1 factual analysis in order to determine the status of who  
2 the customers are as well as, obviously, the forensic  
3 accounting in terms of establishing the amount that may be  
4 due to the customer in the event of an allowed claim.

5 Needless to say, countless hours were spent  
6 just on that and it is a top priority of the Trustee, and  
7 we will move as aggressively as we can move those customer  
8 claims going forward.

9 In addition to those, there are, of course,  
10 other litigations that are filed before Your Honor and you  
11 are familiar with that, including Chais, which was argued  
12 before you this morning and many others, Picower, which is  
13 in settlement discussions as has been well reported and a  
14 number of others that are ongoing before Your Honor.

15 In addition to those, there are literally  
16 dozens, if not hundreds of litigations that are being  
17 reviewed and contemplated in connection with the over 20  
18 billion dollars that was paid out in the short period of  
19 time of about 24 months prior to the demise of the BLMIS.

20 Those constitute significant potential  
21 recoveries by the Trustee of customer property. We are  
22 doing our very best to deal with those in an applicable  
23 way. It may very well be before the end of the year there  
24 will be a significant number of claims that will be filed.

25 The approach of the Trustee throughout with



1 regard to both large and small, people who are net winners  
2 and losers, who have received what we believe to be  
3 preference and fraudulent conveyances consisting of false  
4 profits, we have reached out to those folks.

5 And the feeder funds as well as the  
6 individual funds, they require a great deal of time but we  
7 believe it is the best approach. This is a case in which  
8 no one feels as though they win. Everyone feels as though  
9 they lost, the winner and the losers. We recognize that.  
10 We do our very, very best to work with them as best as we  
11 can to work out an accommodation if we can.

12 Those that are significant, obviously, Your  
13 Honor is going to see. Those that are small, and there  
14 are many that are very small, you don't as we are not  
15 required under the rules.

16 But in each and every case we are in  
17 contact with counsel especially with the feeder funds, but  
18 in connection also with many of other individuals in  
19 conducting our investigation and working out what we can in  
20 negotiations and settlement. If we can't do that, as I  
21 have said, we will see a lot of complaints. Those involve  
22 the feeder fundss throughout Europe, Caribbean, British  
23 Virgin Islands, the Caymans, and Bermuda. That is why we  
24 have all the counsel we retained, as each of those are  
25 very, very complicated.

1 As is reflected in our time records, what  
2 we have found is that Mr. Madoff became a securitized debt.  
3 We found there are very sophisticated transactions  
4 involving major financial institutions as well as the  
5 feeder fundss, where multiple layers of debt were incurred  
6 funded by the Madoff returns. They were, as we all know,  
7 available for years and years and there were steady  
8 returns. They were just the kind of returns that people  
9 in the financial industry looked to securitize, to create  
10 those instruments, swaps, and credit the swaps.

11 All of that is involved in the Madoff  
12 enterprise involving not just Mr. Madoff but also involving  
13 all the people with whom he dealt. These are enormously  
14 complicated an require a good deal of deconstruction and  
15 each one of those represents hundreds and hundreds of  
16 millions of dollars in potential recovery.

17 The efforts you can see from our records  
18 reflect that as do things that don't appear necessarily in  
19 the Court's record but are reflected in Your Honor's review  
20 in the time records, but I can talk about them openly here,  
21 they are reflected in our investigations and it's well  
22 known to people on the other side. We are not doing  
23 things that counsel is not fully aware of because we are in  
24 negotiation with most of them before proceeding with  
25 litigation against them.

1 We are well aware of the statute and we are  
2 well prepared to follow through with those if we have to.

3 In addition to all that work, there is an  
4 ongoing array, a good deal of it before Your Honor, of what  
5 I would call individual litigation that occurs just in the  
6 administration of the estate. Whether it be seeking  
7 injunctive relief before Your Honor, whether it be dealing  
8 with various motion practices that we have that is not  
9 related to a specific litigation, and as Your Honor is  
10 aware, there is a good deal of that occurs as well.

11 So we have multiple teams involved in each  
12 of those endeavors, as again it's reflected in our time  
13 records.

14 I believe that all of the work and I know  
15 the SIPC Trustee agrees and supports it. We are reviewed  
16 very, very carefully. I prepare that bill along with some  
17 assistants working diligently every month. I could tell  
18 you for a fact there are many, many conversations with SIPC  
19 where they review specifically who is at a meeting, how  
20 many people are attending, how much time is spent, was it  
21 productive, what were you specifically seeking to do.

22 This is by far not a rubber stamp. This  
23 is a very intensive review that takes place every month by  
24 SIPC, with regard to this at two levels. Both at the  
25 assistant general counsel, Mr. Bell, who is here, as well

1 as by general counsel herself.

2 So, Your Honor, when this arises before you  
3 it arises before you after having thoroughly been reviewed  
4 and approved by SIPC. I would respectfully ask Your Honor  
5 to approve our application.

6 MR. BELL: Your Honor, I thank Mr. Sheehan  
7 for his talk about the exhaustive review that SIPC does  
8 with regard to the Trustee and counsels monthly  
9 applications pursuant to this Court's monthly compensation  
10 order.

11 There are many discussions about the fees.  
12 There are many pages in the applications. I could advise  
13 the Court that each and every page is reviewed. Discussions  
14 are had and decisions are made, and SIPC after that review,  
15 with the concurrence of the Trustee and counsel, will  
16 follow the monthly procedures order and pay.

17 SIPC does that at two levels. At my level,  
18 I am the staff attorney on the case even though I have a  
19 title.

20 Then it is done by general counsel and the  
21 general counsel and I have engage in extensive discussions  
22 after I have had my extensive discussions with the Trustee  
23 and its counsel.

24 So the thoroughness of this review I could  
25 assure the Court where we say, carefully evaluated, I think

1 you could use the words that we exhaustively evaluate the  
2 applications. We take this responsibility extremely  
3 seriously.

4 So we have done the review and we have  
5 followed our recommendation by SIPC's general counsel, and  
6 we support the entry of an order for the approval of the  
7 applications as filed.

8 MR. SMITH: Good afternoon, Your Honor  
9 Peter Smith of Becker & Poliakoff, on behalf of the  
10 objection filed by the Peskins and other customers.

11 Your Honor, I will just address the issue  
12 of the most recent grounds contained in this objection, not  
13 the ones that reiterate or reiterate from the first two  
14 objections that were filed, but I would mention are subject  
15 to appeals. Specifically that the Trustee and his  
16 counsel's involvement in the Canavan adversary proceeding  
17 filed last month, around April 5 or so, in which the  
18 Trustee and counsel seek to enjoin an action filed in the  
19 district court in New Jersey. On April 13, Your Honor  
20 denied the application for a TRO.

21 The hearing on the preliminary injunction  
22 motion is rescheduled, pending some discovery disputes.

23 The Trustee and his counsel we believe had  
24 disqualified themselves, we believe, based on the positions  
25 they have taken in the adversary proceeding because they

1 have essentially argued the position of the defendants in  
2 that New Jersey action. Therefore, they are directly  
3 adverse to every customer who would benefit from a positive  
4 judgment in that proceeding.

5 The Trustee and his counsel have made  
6 substantive and procedural defenses, asserted them on  
7 behalf of the defendants who are in the New Jersey action  
8 that even the defendants themselves in the action have not  
9 made.

10 All the defendants in that action have done  
11 is to seek to have the action transferred here. When it  
12 gets here Your Honor will have a preview I suppose of all  
13 the defenses that they will raise.

14 There is no basis, Your Honor, for them to  
15 have done that in their papers.

16 I just want to give you a few examples of  
17 what was contained in the motion for preliminary  
18 injunction.

19 THE COURT: This is a request for fees.

20 MR. SMITH: What we argue, Your Honor,  
21 that is --

22 THE COURT: I am hearing more of a defense  
23 with respect to the litigation that is pending before me.

24 MR. SMITH: No, Your Honor, we will hear  
25 more of that I suppose in the weeks to come, but the issue

1 right here --

2 THE COURT: You say that they should not be  
3 asking for fees for their involvement in the New Jersey  
4 litigation.

5 MR. SMITH: I don't think I said that.

6 THE COURT: Isn't that what you are saying?

7 MR. SMITH: Their fees for whatever they do  
8 or have done in the New Jersey application are probably not  
9 part of the application because I think this one cut off in  
10 January.

11 THE COURT: But, nevertheless, it is their  
12 activities supports their argument that they have that it  
13 has disabled them for asking for fees because they are  
14 breaching some duties that they have.

15 MR. SMITH: I believe that the breach of  
16 duty is their loyalty to the customers. And I think it is  
17 very clear that any customer who would see those papers,  
18 and customers are aware of what is going on in those  
19 proceedings, they are aware of this fee application --

20 THE COURT: One wonders when one peels it  
21 away whether everyone under your theory could be disabled  
22 under those same theories.

23 MR. SMITH: Who else could be?

24 THE COURT: All counsel.

25 MR. SMITH: No, only the counsel who took

1 the position contrary --

2 THE COURT: That is an opinion that you  
3 have.

4 MR. SMITH: They are arguing the position  
5 of the defendants.

6 THE COURT: Let me hear you out.

7 MR. SMITH: Okay. So, Your Honor, the  
8 customers to whom the Trustee is supposed to be loyal can  
9 only view the complaint for the preliminary injunction in  
10 one way, which is that the Trustee and his counsel have put  
11 that aside in this regard with respect to the persons who  
12 the customers are suing to recover damages. For that  
13 reason it is impossible for there not to be an appearance  
14 of a conflict of interest between the Trustee and Baker  
15 Hostetler to whom they are supposed to be loyal in this  
16 proceeding.

17 For that reason, they should not receive  
18 their fee and there should at least be an evidentiary  
19 hearing as to whether they should be disqualified.

20 THE COURT: Thank you.

21 MR. SMITH: Your Honor.

22 MR. SHEEHAN: Your Honor, I don't intend  
23 to argue the motion here. I will say one thing. I would  
24 suggest there are a great many customers that would think  
25 what we are doing in terms of trying to preserve this



1 Court's jurisdiction in connection with the net equity  
2 ruling which is a whole thrust of why we are seeking to  
3 have that case enjoined and why the people in New Jersey  
4 are seeking to have it transferred here, there are a whole  
5 host of customers who have bought that argument. I will  
6 leave it out there.

7 MR. SMITH: Your Honor, I will say this  
8 quickly, if the only goal was to protect the net equity  
9 decision they would not have to raise defenses for the  
10 defendants. They could have stopped on the ground for the  
11 preliminary injunction without saying all of the things  
12 they said in their motion how the claims are without merit;  
13 however there are procedural problems with that complaint.  
14 They did not have to say anything further. They have yet  
15 to answer for why they did these things.

16 If it is not they are advocating on behalf  
17 of those defendants, why on earth did they do it? There is  
18 no basis for it. Thank you.

19 THE COURT: Thank you. I will overrule  
20 your objection. It is quite obvious that the objectors  
21 here are on the other side of many litigations with the  
22 Trustee.

23 It is always interesting that it would be  
24 part of the practice, and it shouldn't be to try to disable  
25 your adversaries or take a legal position based on the fact

1 you seek to disable counsel.

2 But as I have pointed out in my statements  
3 previously, I think if one peels away all the interests  
4 that the various parties represent, one might find very  
5 easily an appearance of conflict of interest of counsel,  
6 and I could think of several areas which were involved in  
7 all of the litigations before me.

8 What is clear to me, and one of the reasons  
9 I am rejecting the argument here, is that these objectors  
10 and their counsel have been very active in creating new  
11 litigation made of sandboxes in multiple jurisdictions,  
12 which in some form indicates a disagreement with the  
13 Court's net equity decision.

14 It is understandable that the objectors  
15 would seek to have the Trustee disabled, but that is not a  
16 ground here for arguing against the consideration by this  
17 Court of the request for fees under 78 -- and I won't go  
18 through all of the Es -- when SIPC finds the fees  
19 appropriate and the disinterestedness of the Trustee has  
20 already been measured in the early part of the proceeding,  
21 that the statute has the words, "award the amounts  
22 recommended."

23 I find no basis for finding that the  
24 Trustee should be found to have an appearance of a conflict  
25 of interest. As a matter of fact, I think there is an

1 obligation wherever the administration of the Madoff estate  
2 is a implicated for the Trustee to appear and deal with  
3 that.

4 That essentially is the main argument that  
5 is being made today, the additional argument that is being  
6 expressed.

7 If you bring on litigation, it is obvious  
8 that the Trustee has to go and react to it if that  
9 litigation implicates the administration of the estate, and  
10 that is apparently is the case here.

11 Objection is overruled. The decision is  
12 reserved with respect to all motions thus heard.

13 MR. SHEEHAN: Your Honor, I have an order  
14 that I would like to submit, if I may approach.

15 THE COURT: Yes.

16 MR. SHEEHAN: Thank you, Your Honor.

17 THE COURT: It is unfortunate but more  
18 litigation, more fees.

19 I have approved the order.

20 MR. SHEEHAN: Thank you very much, Your  
21 Honor. Thank you for all your time.

22 THE COURT: Thank you.

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C E R T I F I C A T E

STATE OF NEW YORK                }  
  }       ss.:  
COUNTY OF NEW YORK             }

I, MINDY CORCORAN, a Shorthand Reporter  
and Notary Public within and for the State of New York, do  
hereby certify:

That I reported the proceedings in the within entitled matter, and that the within transcript is a true record of such proceedings.

I further certify that I am not related, by blood or marriage, to any of the parties in this matter and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my  
hand this 5th day of May, 2010.

Mindy Rothman-Corcoran

Digitally signed by Mindy Rothman-Corcoran  
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